

International IDEA
The Hague, Netherlands

June 5, 2023

Your Honor:

I am pleased to recommend Will McCabe to you as a prospective law clerk. Will worked for me as an intern in the Summer of 2022 at the International Institute for Democracy and Electoral Assistance (International IDEA) in The Hague, and he is an exceptional individual who will be highly effective as a law clerk.

International IDEA is an intergovernmental organization mandated to support democracy and democratic transitions. I have a J.D. from Columbia University and have worked in international development and constitution-building for over 15 years. I currently head the Constitution-Building Programme, which provides comparative knowledge and support in relation to constitution-building processes and comparative constitutional design.

For the two months Will worked with our team as a legal intern, I interacted with him daily and supervised his work on all projects. One significant task Will completed was producing memoranda detailing the constitutional history, structure, and current challenges of Albania, Kosovo, Serbia, and Montenegro in connection with our organization's expanding presence in the Western Balkan region. He also compiled comparative data on diaspora democratic participation and representation in various countries and prepared a memorandum on parliamentary oversight mechanisms established by the Armenian constitution as we sought to provide guidance on constitutional reform to representatives of the Armenian government. Will also researched the development of citizens' assemblies for climate ("climate assemblies") in Luxembourg and Spain and attended a virtual conference on the growth of climate assemblies across Europe to assist my colleague Sharon Hickey in her research on the constitutional implications and possibilities of these bodies.

Will was an outstanding member of the team and is among the best interns we have hired. Will accomplished his assignments with a high level of independence, competence, and diligence. He possesses a high degree of intellectual curiosity and brings a broad base of knowledge to his work. He always completed his projects on time and without requiring further revisions. He completed his assignments independently, and he was comfortable asking for clarification or guidance when directions were unclear. Will showed a deep curiosity for the subject matter and was always willing to take on a new kind of project. He was a friendly, sociable presence in the office and worked well with the other International IDEA employees, including the other law student intern. Overall, he was a real pleasure to have as a member of the team.

I should like to emphasize two things that struck me strongly during the short time Will was with us. The first was Will's intense intellectual curiosity to understand the issues he was writing about—the history and context of the different political environments we were dealing with. Will has the admirable quality of never just asking "what?" but always seeking to understand "why." Secondly, Will exhibited important values of caring for those around him, supporting those who needed help without being afraid to ask for help himself, and a strong sense of family and where he comes from. I find increasingly that our young interns—in their race to get ahead of some perceived competition, perhaps—are often lacking in these values which, for me, are essential in considering the kinds of persons we should be supporting in their careers.

I am pleased, therefore, to offer my strong, unconditional recommendation. Beyond the general information provided here, I am happy to answer any specific questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sumit Bisarya', with a stylized flourish at the end.

Sumit Bisarya, JD
Head of Mission, the Netherlands
Head of Constitution-Building, International IDEA

William McCabe

#907-B, 713 South Henry Street, Williamsburg, Virginia 23185
(857) 636-2950 | wjmccabe@wm.edu

WRITING SAMPLE

This document is adapted from a legal memo I wrote during the Spring 2022 semester for my Legal Research and Writing class. This memo is substantially my own work and has not been edited by others.

**IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF GEORGIA
COLUMBUS DIVISION**

REVEREND FELDSPAR IVORY-PERIDOT,)	
)	
<i>Plaintiff,</i>)	Civil Action No: 42487cv-03072022
)	Jury Trial Waived
v.)	
)	William McCabe
STERLING MOONSTONE, et al.,)	
)	I certify this document contains
<i>Defendants.</i>)	3,442 words.

**MEMORANDUM SUPPORTING DEFENDANT DIAMOND MARKETS, INC.'S
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

This case features a plaintiff seeking over half a million dollars for a mere forty-five minutes of inconvenience. Georgia case law strongly emphasizes sensitivity to context when evaluating the reasonableness of a detention, its manner, and its duration, and here, the facts favor summary judgment. Ivory-Peridot activated the antishoplifting alarm, giving Diamond's agent Sapphire Garnet reasonable grounds to detain her on suspicion of shoplifting. The meeting room where Diamond employees are instructed to bring suspected shoplifters was busy, requiring Garnet to quickly improvise and bring Ivory-Peridot to the next closest room. Once Diamond investigated Ivory-Peridot's suspected shoplifting, the store manager personally apologized to her, gave her a gift card worth more than her purchased items, and allowed her to leave. Because the undisputed facts show Diamond's detention of Ivory-Peridot was reasonable and appropriate under the circumstances, Diamond respectfully requests the Court grant its Motion for Summary Judgment.

STATEMENT OF FACTS

At 2:10 PM on January 4, 2021, Sapphire Garnet was performing her routine security rounds when the antishoplifting alarm went off. (Garnet Dep. at 4-5.) Garnet saw Feldspar Ivory-Peridot sitting on the floor near the exit with her cane next to her and her tote bag lying outside the exit, so she ran to retrieve the tote bag and then to check on Ivory-Peridot, touching her arm and offering to help her up. (Garnet Dep. at 5.) Shouting a little to be heard over the loud alarm, Garnet asked to see Ivory-Peridot's receipt and asked if she had seen the signs informing customers of Diamond Markets, Inc.'s use of antishoplifting devices. (*Id.*) Garnet also identified herself, as called for in Diamond's loss prevention protocol. (*Id.*) Ivory-Peridot responded that she had not seen the signs and that the machine had not printed a receipt. (Ivory-Peridot Aff. Nos. 12-13.) Unbeknownst to Ivory-Peridot, Diamond's employees believed they had already fixed the technical problems of the self-checkout machine she had used. (Garnet Dep. at 7-8.) Garnet was skeptical of Ivory-Peridot's claim the machine had not printed a receipt. (Garnet Dep. at 5.)

Ivory-Peridot had purchased a gift card and gift bag between 2:00 and 2:10. (Aff. Nos. 4, 7, 10.) She had paid for her items at a self-checkout, but the machine malfunctioned and failed to print a receipt. (Aff. No. 9.) Instead of going to the customer service counter, Ivory-Peridot had decided to leave the store "because there was a long line" and she was in a hurry. (Aff. No. 9.) While walking toward the exit, she had dropped her cane and fallen when she had tried to pick it up. (Aff. No. 10.). When she fell, she had dropped her tote bag containing her purchased items beyond the store exit, causing the store's antishoplifting device to go off, which embarrassed her. (Aff. No. 10.)

Once Ivory-Peridot had stood up and told Garnet she had not received a receipt, Garnet suggested they “go somewhere private to talk about” the incident and asked Ivory-Peridot to come with her. (Garnet Dep. at 5.) They walked to the meeting room at the back of the store, where employees usually bring customers suspected of shoplifting. (Garnet Dep. at 5-6.) Garnet made some comments about Ivory-Peridot’s bag which she considered merely casual small talk, although Ivory-Peridot interpreted these remarks as sarcastic. (Garnet Dep. at 6; Aff. No. 14.) Because the meeting room was unexpectedly occupied, Garnet brought Ivory-Peridot to the next closest room, which was a sixty-four square-foot storeroom containing supplies, a stool, a surveillance camera, a full trash can, and an air vent with a small fan. (Garnet Dep. at 6.) It was hot and uncomfortable in the storeroom. (Moonstone Dep. at 7.) Ivory-Peridot did not want to be in the storeroom and waved her cane around, almost hitting Garnet and causing herself to become a little unsteady, prompting Garnet to touch her arm to give her physical support and to take the cane “for everyone’s protection.” (Garnet Dep. at 7.) Unknown to Garnet, Ivory-Peridot did not want to sit on the stool and decided to stand while she remained in the storeroom; also, Ivory-Peridot’s phone was dead. (Aff. No. 19.) Garnet then contacted the manager, Sterling Moonstone, about the incident and met him at the self-checkout machine about two minutes later. (Garnet Dep. at 7-8.) Garnet stayed at the checkout for twenty-five minutes while another employee fixed the machine, and Moonstone stayed with them until he was needed to help with a different customer at another checkout lane. (Garnet Dep. at 8.) Once another employee fixed the machine, Garnet informed Moonstone, and, following his instructions, returned to the storeroom to let Ivory-Peridot know Moonstone would be on his way. (*Id.*). Garnet reached the storeroom two minutes later and told Ivory-Peridot Moonstone would be with them soon, at which point she could leave. (*Id.*) Moonstone arrived at 2:50, explaining the machine’s malfunction to Ivory-

Peridot, apologizing to her, giving her a gift card, and returning her cane and purchased items. (Moonstone Dep. at 8.) The gift card was worth \$10.00. (Aff. No. 21.) The purchased items were worth around \$7.00. (Aff. No. 7.) Ivory-Peridot kept yelling after receiving an explanation, an apology, and a gift card from Moonstone and finally left at 2:55. (Moonstone Dep. at 8.)

ARGUMENT

The Court Should Grant Diamond Markets, Inc.’s Motion For Summary Judgment Because The Commonly Agreed Facts Show Diamond Detained Feldspar Ivory-Peridot Only After She Activated The Antishoplifting Device; Without Threatening Her, Harassing Her, Or Preventing Her From Contacting Others; And Only Long Enough To Investigate And Resolve The Issue, Proving The Grounds For Her Detention, Its Manner, And Its Duration Were Reasonable.

Ivory-Peridot’s triggering of Diamond’s clearly visible antishoplifting alarm system, as well as Diamond’s professional treatment of Ivory-Peridot and its timely resolution of the issue, demonstrate the reasonableness of Ivory-Peridot’s detention and its duration and manner. In federal court, summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56. Here, “the parties agree that there is no genuine dispute as to any material fact” (Pl.’s & Def.’s Joint Stipulation Facts, at 1.) Thus, the only question for the Court is whether the facts in the record show Diamond is entitled to defense from liability for false imprisonment.

Ivory-Peridot admits Diamond was a mercantile establishment that used antishoplifting devices in its store as defined by Ga. Code Ann. § 51-7-61(a). (West 2022). Thus, Diamond need only show by a mere preponderance of the evidence that, under the circumstances, (1) it had “reasonable cause” to detain Ivory-Peridot, and (2) it detained her “in a reasonable manner” and (3) “for a reasonable period of time” *Id.* § 51-7-61(b). It is undisputed Sapphire Garnet and Sterling Moonstone were Diamond’s agents and that Diamond detained Ivory-Peridot as defined

by Ga. Code Ann. § 51-7-20. (West 2022). Even when reading these remedial civil statutes broadly in favor of the plaintiff, as is required, the facts, along with ample persuasive authority, show Diamond’s actions were reasonable.

All three requirements are met here. First, Ivory-Peridot created reasonable grounds for Garnet to detain her by activating the antishoplifting system as she rushed to leave the store. Second, Garnet did not threaten, taunt, or otherwise intentionally mistreat Ivory-Peridot during her detention. Third, Ivory-Peridot was released as soon as Moonstone arrived to definitively resolve the issue, consistent with Diamond’s loss prevention protocols.

Because Diamond reasonably suspected Ivory-Peridot of shoplifting, did not target or harass her, and detained her only while resolving the issue, the Court should grant its Motion for Summary Judgment.

A. Because Feldspar Ivory-Peridot activated the antishoplifting device, Diamond Markets, Inc. had reasonable cause to detain her.

A store’s use of antitheft devices is a crucial factor in determining the reasonableness of its decision to detain a suspected shoplifter. According to Ga. Code Ann. § 51-7-61(b), an agent or employee of a mercantile establishment has “reasonable cause” to detain a person following “the automatic activation of [an antishoplifting] device as a result of a person exiting the establishment” (West 2022). Georgia case law is quite clear: a “[d]efendant’s right to detain is **lawful once the device is automatically activated.**” *Estes v. Jack Eckerd Corp.*, 360 S.E.2d 649, 652 (Ga. Ct. App. 1996) (emphasis added). In *Estes*, the store detained Estes after she left with a tag attached to an item, triggering the antishoplifting device. *Id.* at 650. Although Estes had paid for all her items and only triggered the alarm because a negligent employee had not deactivated the tag, the Court found the employee’s negligence “immaterial” and ruled the store had reasonable cause to detain Estes. *Id.* at 652. The only issues the court identified were

“whether the detention was made in a reasonable manner . . . and if proper notice was posted as required.” *Id.* On the latter point, the court concluded proper notice had been posted because “there were at least two warning signs prominently displayed in the store near the entrance and exit.” *Id.* Similarly, in *Mitchell v. Walmart Stores, Inc.*, the store detained Mitchell when a guard stopped her at the exit after she triggered an antitheft device because an employee had forgotten to remove a security code unit. 477 S.E.2d 631, 632 (Ga. Ct. App. 1996). Mitchell had not acted suspiciously, and the guard stopped her “solely in response to the alarm;” the Court confirmed this created “probable cause.” *Id.* at 632-33.

Like Estes and Mitchell, Ivory-Peridot activated the antishoplifting device despite having paid for her items. However, the triggering of the device is alone sufficient to create reasonable cause for detention when adequate notice is posted. Diamond posted signs notifying customers of its antitheft devices, and relevant case law indicates this is sufficient, regardless of whether the suspected shoplifter saw the signs (here, Ivory-Peridot claimed she had not). As other cases demonstrate, it also does not matter whether Ivory-Peridot had paid or whether she had left the store. Sapphire Garnet responded appropriately to the triggering of the alarm by investigating the possible shoplifting, and, because the self-checkout had not produced a receipt, Ivory-Peridot had no evidence of her innocence. Thus, Diamond had reasonable cause to detain Ivory-Peridot.

B. Because Sapphire Garnet neither threatened nor harassed Feldspar Ivory-Peridot nor prevented her from calling others on her phone, the manner of Diamond Markets, Inc.’s detention of Ivory-Peridot was reasonable.

The conduct of a store’s employees is critical to showing the manner in which it detained a customer was reasonable. Under Georgia law, a mercantile establishment is protected from liability for false imprisonment when “the manner of the detention . . . was **under all the circumstances reasonable.**” Ga. Code Ann. § 51-7-60(2) (West 2022) (emphasis added)

(amended May 2021). Georgia courts have interpreted this statutory language to mean a store must not “subject[] [suspected shoplifters] to gratuitous and unnecessary indignities.” *K Mart Corp. v. Adamson*, 386 S.E.2d 680, 682 (Ga. Ct. App. 1989). The qualifications of “gratuitous and unnecessary” reveal the importance of a case’s unique facts to a court’s determination of reasonableness. *Id.* Georgia courts have recognized that some indignities are necessary and permissible. In *Mitchell v. Walmart Stores, Inc.*, Mitchell’s embarrassment was an acceptable result of her detention, and the other facts of her detention—her not being touched by an employee and her not being accused of theft—made the detention’s manner reasonable. 477 S.E.2d 631, 633 (Ga. Ct. App. 1996).

Here, Ivory-Peridot’s embarrassment was an unavoidable result of the loud alarm, as was Garnet’s raising her voice. Her possible embarrassment from being recorded by the security camera in the storeroom also does not carry weight in evaluating the reasonableness of the detention’s manner, as *Mitchell* shows. Ivory-Peridot’s detention in an uncomfortable room was likewise necessary because the standard room used for detaining suspected shoplifters was in use. Diamond’s protocols lack a provision regarding what a security guard should do when the meeting room is busy; therefore, Garnet was forced to quickly decide where to bring Ivory-Peridot. Using her best judgment under the circumstances, she brought Ivory-Peridot to the storeroom because it was simply the closest room to the meeting room. Although Garnet touched Ivory-Peridot, she only did so to help her stand up after falling and to steady her after almost falling again. Garnet never accused her of theft. As other cases show, such behavior does not rise to the level needed to render the detention’s manner unreasonable.

In *Brown v. Super Discount Markets, Inc.*, Brown and Roper alleged a store security guard, when detaining them, “grabbed Brown’s arm and slung her and . . . slung Roper into a

nearby candy rack,” while the store disputed this, claiming “any touching was non-confrontational and privileged.” 477 S.E.2d 839, 840 (Ga. Ct. App. 1996). Brown and Roper also alleged the guard “pushed Brown down repeatedly . . . and poked her in the back as she was departing the store [and] threatened to . . . have Roper’s child taken away from her and . . . was profane and verbally abusive.” *Id.* In ruling the disputed facts precluded summary judgment, the court indicated the behavior Brown and Roper alleged would qualify as unreasonable, while the facts as presented by the store would have supported a finding of reasonableness. In *Jackson v. Kmart Corp.*, Jackson alleged similar treatment, claiming when the store manager questioned her about her involvement in a theft scheme in his office, he “told her he could make a pass at [her] and that there would be nothing [she] could do about it. In addition, the manager told [her] that he wished she was white, because, according to the manager, shoplifting always involved blacks.” 851 F. Supp. 469, 471 (M.D. Ga. 1994). Jackson also accused the manager of “refus[ing] to allow [her] to . . . call her husband and [telling her] ‘that he was going to keep her there until [she] told him . . . the truth.’” *Id.* at n.1. The Court concluded Jackson’s testimony was “sufficient to challenge the reasonableness of the manner in which she was detained” and could persuade a jury “that the actions of the manager subjected [her] to ‘gratuitous and unnecessary indignities.’” *Id.* at 474 (quoting *Adamson*, 386 S.E.2d at 682).

Garnet clearly treated Ivory-Peridot far more respectfully and appropriately than the store employees treated the plaintiffs in *Brown* and *Jackson*. Garnet did not accuse Ivory-Peridot of shoplifting. Garnet did not seize Ivory-Peridot’s phone. The only reason Ivory-Peridot could not call anyone during her detention is because her phone battery had died, and she did not ask Garnet for a charger or another phone to use. Garnet did not physically attack Ivory-Peridot—the physical contact she did make was benign and meant to be helpful. Garnet did not insult Ivory-

Peridot—though she made a few insensitive remarks, they were a far cry from the lewd insinuations and cruel taunts directed against the plaintiffs in *Brown* and *Jackson*. Garnet’s minor deviations from Diamond’s loss prevention protocols also do not make the manner of the detention unreasonable. In *Brown v. Winn-Dixie Atlanta, Inc.*, the court clarified that “[a]ny failure by store personnel to adhere to internal security guidelines would not demonstrate ‘unreasonableness’ in and of itself. [M]ore would be needed.” 389 S.E. 2d 530, 532 (Ga. Ct. App. 1989) (quoting *Luckie v. Piggly-Wiggly Southern*, 325 S.E.2d 844, 846 (Ga. Ct. App. 1984)). When examined in the context of the unique circumstances of this case, it is clear Garnet’s few departures from protocol, such as her running toward Ivory-Peridot, her touching Ivory-Peridot, and her taking Ivory-Peridot’s cane, mostly arose from Garnet’s concerns for Ivory-Peridot’s safety and the safety of Diamond’s supplies, and it is this context that deserves the most consideration. Thus, Garnet’s behavior and the conditions of Ivory-Peridot’s detention were justifiable and acceptable.

C. *The length of Feldspar Ivory-Peridot’s detention was reasonable because it took Diamond Markets, Inc. a long time to determine Ivory-Peridot’s innocence, and Diamond released her once it had fully resolved the possible shoplifting incident.*

Given the unique nature of each suspected shoplifting incident, whether a given detention’s duration is reasonable depends greatly on context. Ga. Code Ann. § 51-7-60(2) specifies that, for the owner of a mercantile establishment to be protected from liability, “the length of time during which [the] plaintiff was detained [must be] **under all the circumstances reasonable.**” (West 2022) (emphasis added) (amended May 2021). The statute’s emphasis on context is clear, and relevant case law reflects this focus. In *K Mart Corp. v. Adamson*, the store detained Adamson when a security officer escorted her to a back room and questioned her there for a disputed length of time. 386 S.E.2d 680, 681 (Ga. Ct. App. 1989). The court interpreted the

statute to require stores “not [to] subject[] [suspected shoplifters] to continued detention beyond that which is reasonable to ascertain the true facts” *Id.* at 682.

The *Adamson* standard was later applied in *Brown v. Super Discount Markets, Inc.*, where Brown and Roper claimed to have been detained by a security guard in an office for “between an hour and an hour and a half,” but the store claimed the detention lasted “approximately ten minutes.” 477 S.E.2d 839, 840 (Ga. Ct. App. 1996). The court held the dispute of fact was too great to allow summary judgment, reasoning that “whether the . . . length of detention [was] reasonable may be determined as a matter of law only in rare cases where the evidence is uncontroverted.” *Id.* Implicit in the court’s decision is an acknowledgement that, under the circumstances, a detention of ten minutes would likely have been reasonable while a detention of over an hour would have been unreasonable.

Here, Diamond detained Ivory-Peridot for forty-five minutes, which was approximately how long it took for Diamond to investigate and resolve the technical issue which precipitated Ivory-Peridot’s detention. Unlike *Brown*, where a dispute of fact precluded summary judgment, here, the parties agree on how long the detention lasted, meaning this case qualifies as one “where the evidence is uncontroverted” and the Court can determine the length of Ivory-Peridot’s detention was reasonable as a matter of law. *Id.* The uncontroverted evidence shows Diamond’s detention of Ivory-Peridot followed a clear timeline:

- 2:10: Ivory-Peridot triggered the antishoplifting device; Sapphire Garnet escorted her to the back of the store
- 2:15: Garnet contacted manager Sterling Moonstone and went to the self-checkout
- 2:17: Garnet met Moonstone at the self-checkout
- 2:17-2:42: Amethyst Topaz fixed the self-checkout machine

- 2:44: Garnet returned to the back of the store and told Ivory-Peridot Moonstone was on his way
- 2:50: Moonstone arrived at the back of the store, apologized to Ivory-Peridot, returned her purchased items, and gave her a \$10 gift card
- 2:55: Ivory-Peridot left the store with her \$7 of purchased items and the \$10 gift card

Releasing Ivory-Peridot before 2:44 would have been premature, and the additional time she was detained was required for Moonstone to briefly resolve a separate customer issue before clearing up Ivory-Peridot's case. Although Garnet could have explained the situation to Ivory-Peridot and permitted her to leave, Diamond's Loss Prevention Procedures explicitly called for "a security guard, the store manager, and/or an assistant manager [to] return the items to a shopper and apologize" when Diamond determined a detained shopper was innocent of shoplifting. (Moonstone Dep. Ex. 1, at 3.) Diamond's professional adherence to these procedures ensured Ivory-Peridot received a full explanation of the incident from an authority figure who was not directly involved in her detention and confirmed store management knew about and regretted Ivory-Peridot's unfortunate experience. Detaining Ivory-Peridot no longer than necessary to investigate her guilt, give her a full account of the facts, and apologize to and compensate her for her inconvenience was reasonable.

CONCLUSION

Because Defendant Diamond Markets, Inc.'s agents did not threaten or harass Plaintiff Feldspar Ivory-Peridot after she triggered the antitheft alarm system, nor detain her longer than necessary to professionally resolve the issue, Ivory-Peridot cannot prove Diamond acted unreasonably when it detained her on suspicion of shoplifting. Sapphire Garnet responded to the unique circumstances of the incident appropriately by bringing Ivory-Peridot to the nearest

available room once she saw the meeting room was busy and by immediately contacting the manager after detaining Ivory-Peridot. Diamond's actions must be judged in the context of the unique circumstances of this case. Both Diamond and Ivory-Peridot have agreed no material dispute of fact exists here; therefore, the facts show Diamond is entitled to judgment as a matter of law. Diamond respectfully requests the Court grant its Motion for Summary Judgment.

Respectfully submitted,

The 24th day of April, 2022.

/s/ William McCabe

William McCabe

Attorney for Defendant Diamond Markets, Inc.

OF COUNSEL:

Grills & Martin, LLC

2711 Norwood Avenue

Thomasville, Georgia 31757-4614

Telephone: (229) 555-5760

Applicant Details

First Name **William**
 Last Name **McCarter**
 Citizenship Status **U. S. Citizen**
 Email Address mccarter.william.e@gmail.com
 Address

Address

Street
2220 Pine St.
City
Philadelphia
State/Territory
Pennsylvania
Zip
19103

Contact Phone Number **484-889-2045**

Applicant Education

BA/BS From **Pennsylvania State University-
University Park**
 Date of BA/BS **May 2021**
 JD/LLB From **University of Pennsylvania Carey Law
School**
<https://www.law.upenn.edu/careers/>
 Date of JD/LLB **May 15, 2024**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **University of Pennsylvania Law Review**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/
Externships **Yes**
 Post-graduate Judicial Law
Clerk **No**

Specialized Work Experience

Recommenders

Baker, Tom
tombaker@law.upenn.edu

Lindell, Karen
lindellk@law.upenn.edu
215-898-8419

McIntosh, Jacob
jmmcintosh12@gmail.com

This applicant has certified that all data entered in this profile and any application documents are true and correct.

William McCarter
2220 Pine St.
Philadelphia, PA 19103
484-889-2045
wemccar@pennlaw.upenn.edu

June 10, 2023

The Honorable Juan R. Sanchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez,

I am a rising third-year law student at the University of Pennsylvania Law School and a Senior Editor on the University of Pennsylvania Law Review. I am writing to apply for a clerkship in your chambers for the 2024-2025 term or any subsequent term.

Enclosed please find a copy of my resume, transcripts, references, and writing sample. My writing sample is my submission to the American College of Coverage Counsel's 2023 Insurance Law Writing Competition, in which I won first place.

I would be honored to discuss my experiences and qualifications further in an interview scheduled at your convenience. Thank you in advance for your time and consideration. I look forward to hearing from you.

Respectfully,

William McCarter

William McCarter
2220 Pine St., Philadelphia, PA 19103 | 484-889-2045
wemccar@pennlaw.upenn.edu

EDUCATION

University of Pennsylvania Law School, Philadelphia, PA May 2024 (expected)
 J.D. Candidate
 Activities: *University of Pennsylvania Law Review* (Associate Editor), Christian Legal Clinics of Philadelphia (pro bono)

Schreyer Honors College: The Pennsylvania State University, University Park, PA May 2021
 B.S., *magna cum laude*, Economics
 B.A., *magna cum laude*, Classics
 Honors: Full-Tuition Scholarship for Academic Achievement; Phi Beta Kappa; Key Into Public Service Scholarship

WORK EXPERIENCE

Securities & Exchange Commission, Enforcement Division Washington, DC (remote)
SEC Scholars Intern January 2023 – April 2023

- Prepared chronology of events and factual record in pre-*Wells* notice enforcement investigation
- Summarized testimony taken in pre-*Wells* notice enforcement investigation
- In mock testimony exercise, interviewed SEC attorneys acting as “subjects” in a hypothetical insider trading case
- Prepared legal research memoranda on evidence and securities law issues

Chambers of The Hon. Ryan D. Nelson (9th Cir.) Idaho Falls, ID (remote)
Judicial Extern September 2022 – December 2022

- Edited draft opinions and bench memoranda for Bluebooking accuracy, spelling and grammar, and substantive accuracy
- Summarized briefs for supervising clerk explaining the arguments of the parties in a complex case
- Drafted bench memoranda and incorporated feedback from supervising clerk

Covid Litigation Tracker Project (Prof. Tom Baker, Penn Law) Philadelphia, PA
Legal Analyst May 2022 – Present

- Performed docket research on both state and federal business insurance lawsuits related to the Covid-19 pandemic
- Prepared research memorandum on the state of Covid-related business interruption litigation in state and federal courts
- Prepared summaries of state and federal appellate cases to be published on the CCLT database website

Senate of Pennsylvania, Office of Senator Thomas Killion (PA-9) West Chester, PA
Legislative Intern May 2019 – August 2019

- Drafted amendments to legislation that became Act 130 of 2020, which was the first new pipeline safety legislation in Pennsylvania in a generation
- Drafted and submitted proposed rules to the Pennsylvania Utility Commission (PUC)
- Analyzed data from the PUC regarding the revenue from impact fees assessed on natural gas drilling

SELECTED PUBLICATIONS & PRESENTATIONS

- First Place, 2023 American College of Coverage Counsel Insurance Law Writing Competition.
- “Covid-19, One Year Later.” *The Wall Street Journal*. March 16, 2021.
- “Legal Language in Ovid’s *Metamorphoses*.” *Conference of the Classical Association of the Atlantic States*. October 2020.
- “Honor From Augustine Onward.” *First Prize, Paterno Fellow Essay Contest*. February 2020.
- “Impeachment in the Shadow of the Constitution.” *The Wall Street Journal*. November 20, 2019.
- “Law, Debt, and Economy in Ancient Civilizations.” Undergraduate Thesis (Supervisor: Prof. Rubio, Penn State).

Record of: William McCarter
 Penn ID: 24371967
 Date of Birth: 27-SEP
 Date Issued: 12-MAY-2023

The University of Pennsylvania

U N O F F I C I A L

Page: 1

Level:Law

Primary Program

Program: Juris Doctor
 Division : Law
 Major : Law

SUBJ NO.	COURSE TITLE	SH GRD	R	SUBJ NO.	COURSE TITLE	SH GRD	R
INSTITUTION CREDIT:				Institution Information continued:			
				LAW 6070	Antitrust (Hovenkamp)	3.00 A	
				LAW 6220	Corporations (Fisch)	4.00 A	
				LAW 6620	Securities Regulation (Zaring)	3.00 A	
Fall 2021				LAW 8020	Law Review - Associate Editor	0.00 CR	I
Law				LAW 9400	Empirical Law and Economics (Klick)	3.00 A	
LAW 500	Civil Procedure (Fisch) - Sec 2	4.00 A-			Ehrs: 13.00		
LAW 502	Contracts (Ruskola) - Sec 2B	4.00 A		Spring 2023			
LAW 504	Torts (Baker) - Sec 2B	4.00 A		Law			
LAW 510	Legal Practice Skills (Lindell)	4.00 H		LAW 5550	Professional Responsibility (Reich/Buckley)	2.00 A+	
LAW 512	Legal Practice Skills Cohort (Rothermich)	0.00 CR		LAW 6400	Federal Income Tax (Shuldiner)	4.00 A+	
	Ehrs: 16.00			LAW 6450	Insurance Law (Baker)	3.00 A	
Spring 2022				LAW 6880	Conservative and Libertarian Policy and the Law (DiPompeo/Barkley)	1.00 CR	
Law				LAW 8020	Law Review - Associate Editor	1.00 CR	I
LAW 501	Constitutional Law (Berman) - Sec 2	4.00 A		LAW 9990	Independent Study (Zaring)	3.00 A	
LAW 503	Criminal Law (Mayson) - Sec 2	4.00 A-			Ehrs: 14.00		
LAW 508	Property (Gordon)	3.00 A+		***** TRANSCRIPT TOTALS *****			
LAW 510	Legal Practice Skills (Lindell)	2.00 H		Earned Hrs			
LAW 512	Legal Practice Skills Cohort (Rothermich)	0.00 CR		TOTAL INSTITUTION	59.00		
LAW 601	Administrative Law - 11 (Lee)	3.00 A		TOTAL TRANSFER	0.00		
	Ehrs: 16.00			OVERALL	59.00		
Fall 2022				***** END OF TRANSCRIPT *****			
Law				***** CONTINUED ON NEXT COLUMN *****			

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 10, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant William McCarter

Dear Judge Sanchez:

I am writing in support of the application of William McCarter for a clerkship in your chambers. I have worked closely with Will over the past year in my Covid Coverage Litigation Tracker project. He received the top grade in my torts class during his first year, and he received the second highest grade in my insurance law class this past semester.

Will is an outstanding clerkship candidate – perhaps our very best this year. He is among the top two or three research assistants I have had the good fortune to work with in my 30+ years in law teaching.

Will has an incredible work ethic and a tremendous sense of responsibility. This past academic year, he has been solely responsible for tracking the hundreds of appellate cases in our database, he helped me develop a new database of D&O insurance coverage cases, and he won an insurance law brief-writing contest – all in his “spare” time on top of a demanding class schedule and law review work.

As I learned to my disappointment while serving as Reporter for the Restatement of the Law of Liability Insurance, even the best students sometimes struggle to understand exactly what a court does and does hold and, thus, what a case truly stands for. Not Will. If we both read a new case and disagree about the court’s analysis or holding, he is just as likely to be right as I am. I trust him completely. On the very rare occasion when he fails to get something 100% right, he accepts correction with grace and never repeats the same mistake.

I cannot think of a better candidate for a demanding clerkship. His work is fast, accurate, and excellently analyzed. It is clear that he truly enjoys the work and the pace. And I am confident that he would thrive in a setting with other similarly talented and ambitious clerks. I strongly urge you to give him serious consideration.

Very truly yours,

Tom Baker
William Maul Measey Professor of Law
Tel.: (215) 898-7413
E-mail: tombaker@law.upenn.edu

Tom Baker - tombaker@law.upenn.edu

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 10, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant William McCarter

Dear Judge Sanchez:

I am writing to provide my highest recommendation of William McCarter to serve as your law clerk. Will is a brilliant legal thinker with a diligent work ethic and a warm personality, and he genuinely loves to write. I am confident he would be an outstanding addition to your chambers.

First, Will unquestionably has the skills needed to succeed as a law clerk. I met Will in the fall of 2021, when he was one of the 45 students assigned to my year-long 1L Legal Practice Skills course at Penn Carey Law. The course involves multiple formal writing assignments, as well as a negotiation, an oral argument, and several client simulation exercises, so I became very familiar with students' writing and oral communication skills, analytical ability, and overall professionalism. Will immediately excelled in every domain. From his first writing assignment, he wrote with sharp, engaging prose and displayed keen analytical instincts. By the end of the year, his written legal analysis was head and shoulders above most of his peers', communicating nuance and depth in a clear, compelling voice. He also took readily to the oral advocacy components of the course; his firm command of the law and facts, combined with his calm and mature demeanor, made him a natural oral advocate during our final mock summary judgment arguments. Across all domains, what stood out most about Will was his intelligence – he saw connections others missed, and could make sense of complexities that left others puzzling. Will's stellar transcript came as no surprise to me, given the smart, sophisticated analytical abilities he displayed in my class.

Second, Will is diligent and driven, bringing genuine passion to his work. He has shared with me that he truly loves to write, and he consistently seeks opportunities to deepen his writing skills – twice publishing op-eds in The Wall Street Journal, entering (and winning) multiple writing competitions, and serving on the University of Pennsylvania Law Review. He is also intellectually curious, and highly responsive to feedback. He is one of the rare students I've taught who, despite strong natural abilities, continuously strives to improve – putting as much into the revisions of his work as he does into the initial drafts, and eagerly soliciting feedback.

Finally, Will is a warm, kind, and easy-to-work-with person. His eagerness and intellectual curiosity are contagious – a quick chat in the hallway can easily turn into a lengthy discussion of an idea or a case. My teaching assistant shared with me that, although she tried to remain unbiased, Will was easily her favorite student because of his enthusiasm for the content and warm personality. I'm confident that he will help to foster a collaborative workplace environment wherever his career takes him.

In short, Will is an exceptional law student, and I'm sure he will be an exceptional law clerk as well. I hope you give his application serious consideration, and please let me know if you have any questions or would like any additional information.

Sincerely,

Karen U. Lindell
Senior Lecturer, Legal Practice Skills
lindellk@law.upenn.edu
215-898-8419

Karen Lindell - lindellk@law.upenn.edu - 215-898-8419

April 26, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a current Ninth Circuit clerk, and I supervised William McCarter when he externed for my judge in fall 2022. I write to enthusiastically recommend William for a clerkship in your chambers.

I am a fifth-year attorney and have supervised about twenty externs and summer associates; William is without doubt the best of them all. Indeed, my co-clerks and I often commented that William was more like a fifth clerk than an extern, because of the level of responsibility he could handle and the level of writing he produced.

William's work product was exceptional. I had the good fortune of working with him on multiple assignments. The biggest was a significant appeal after a jury verdict. William drafted lengthy memoranda about motions in limine, evidentiary rulings, inconsistent jury verdicts, punitive damages, and trial management decisions. It was a big and complicated project, but he knocked it out of the park. The work was impeccable and without errors; the research turned over every stone; and the writing was crisp, persuasive, and well organized. Typically, I need to edit extern work heavily, even for very good externs. Yet William's analysis could be circulated to the panel and adopted in the written disposition with almost no revisions. He even managed to turn in the project several days ahead of schedule. The rest of his work reflected a similar sky-high level of quality.

William's externship was remote (as our Idaho location often requires). But he is a self-starter and extremely diligent, so the distance and lack of direct oversight was not a problem at all. He is a great communicator, was the first to volunteer, and needed no handholding. I try to give externs constructive criticism, but the only major comment I had for William was that he was working so hard I was concerned his externship might distract from his studies. His straight A's that semester proved my worries were misplaced. On top of his strong intellect, William is also pleasant, easy-going, humble, and a team player. I suspect he will be an absolute joy to have as a colleague, as he was for us.

All in all, I am confident William will make a great law clerk. My judge does not hire externs as clerks, but if he did, I would recommend emphatically that William be hired to work in our chambers. I hope you strongly consider hiring William for yours. If I can help in any way, please feel free to reach me at my cell phone (817-966-6878) or personal email (jmmcintosh12@gmail.com).

Jacob McIntosh

Jacob McIntosh - jmmcintosh12@gmail.com

William McCarter
2220 Pine St., Philadelphia, PA 19103 | 484-889-2045
wemccar@pennlaw.upenn.edu

The attached writing sample is a lightly edited version of my submission for the 2023 American College of Coverage Counsel Insurance Writing Competition, in which I won First Place. The submission for the writing competition was limited to 3,000 words.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

INTRODUCTION

Insurance policies are, at bottom, contracts. In this case, Blue Star Co. (“Blue Star”) is attempting to gain more through its insurance contract with Vibrant Insurance Company (“Vibrant”) than it bargained for. First, insurance contracts are intended to protect: they do not cover affirmative claims. Second, this insurance contract only covers reasonable defense costs, not all costs that Blue Star incurred. Third, Blue Star must establish that those costs are reasonable: it may not merely claim that its costs are reasonable, expecting Vibrant and the Court to take it at its word. In accordance with Texas law, summary judgment should be granted in favor of Vibrant on these issues.

STATEMENT OF MATERIAL FACTS

Vibrant issued a standard Comprehensive General Liability Policy to Blue Star. (Record.) During the policy’s coverage period, Blue Star was sued by Blu Star Co. (“Blu Star”) for trademark infringement, whereupon Blue Star retained local counsel and additional intellectual property counsel. (Record.) In the course of litigation, Blue Star filed a “mirror image” counterclaim against Blu Star alleging trademark infringement. (Record.)

Instead of informing Vibrant of the existence of the claim when they received it, Blue Star notified Vibrant of the claim against it after answering and filing the aforementioned counterclaim, three months into the suit. (Record.) Vibrant, after reviewing the claim, determined that while it had a duty to defend Blue Star, there were potential coverage issues, for which reason Vibrant provided Blue Star with a reservation of rights letter. (Record.) In this letter, Vibrant noted the potential coverage issues, which raised a potentially disqualifying conflict of interest, but nonetheless tendered a defense for the claim against Blue Star (though, in accordance with the limitations of coverage under the policy, not for Blue Star’s affirmative claim). (Record.)

The policy provided that Vibrant “will pay those sums that the insured becomes legally obligated to pay as damages because of ‘personal injury’ and ‘advertising injury’ to which this insurance applies.” (Record.) Vibrant has “the right and duty to defend the insured against any ‘suit’ seeking those damages.” Furthermore, Vibrant “will pay, with respect to any claim we investigate or settle, or any ‘suit’ against an insured [it] defend[s]” “[a]ll expenses [it] incur[s]” and “[a]ll reasonable expenses incurred by the insured at [Vibrant’s] request.” (Record.)

Retaining its previously selected counsel, Blue Star submitted bills to Vibrant, who reviewed the bills for reasonableness with an auditing service. (Record.) Vibrant paid a portion – 10% – of the fees incurred by Blue Star in its defense and prosecution of its affirmative claim. Blue Star now seeks to recover from Vibrant the balance of the fees incurred in its defense and claim against Blu Star, in addition to claims for bad faith and violations of the Texas Insurance Code. (Record.)

SUMMARY JUDGMENT STANDARD

Summary judgment is warranted where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Rule 56 of the Federal Rules of Civil Procedure “requires the prompt disposition of cases in the absence of any genuine issues of material fact for the court to consider.” *Am. Home Assur. Co. v. United Space All., LLC*, 378 F.3d 482, 486 (5th Cir. 2004).

ARGUMENT

I. Vibrant is Not Required to Pay The Costs of Prosecuting Affirmative Claims.

Because Blue Star’s counterclaim is not a covered claim as defined by the language of the policy, therefore Vibrant has no duty to pay any costs for its prosecution. “When terms of an insurance policy are unambiguous, they are to be given their plain, ordinary and generally accepted meaning unless the instrument itself shows that the terms have been used in a technical or different

sense.” *Ramsay v. Md. Am. Gen. Ins. Co.*, 533 S.W.2d 344, 346 (Tex. 1976) (citations omitted).

“[C]ourts will not so construe plain language as to make a contract embrace that which it was intended not to include.” *Brit. Am. Assurance Co. v. Miller*, 44 S.W. 60, 62 (Tex. 1898).

The clearly manifested intent of the parties was that Vibrant would defend Blue Star – not fund suits against others, as the policy language unambiguously contemplates only defending the insured. The policy language agreed to by both parties provides that “[Vibrant] will have the right and duty to defend the insured against any ‘suit’ seeking those damages.” (Record.) The phrase “against any ‘suit’” makes clear that the intent of the parties was that Vibrant would *defend* Blue Star, not fund its litigation.

This language, considered in light of the “eight corners” rule, supports the conclusion that the duty to defend does not apply to affirmative claims. “The eight-corners rule provides that when an insured is sued by a third party, the liability insurer is to determine its duty to defend solely from terms of the policy and the pleadings of the third-party claimant.” *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 307 (Tex. 2006). While the eight corners rule does not define the scope of the duty to defend, *Spec’s Fam. Partners, Ltd. v. Hanover Ins. Co.*, No. CV H-16-438, 2019 WL 3302816, at *9 (S.D. Tex. July 23, 2019), the rule is indicative of the fact that the intent of liability coverage is to protect the insured from claims against it.

The duty to defend Blue Star against Blue Star’s claim does not create an obligation on the part of Vibrant to fund Blue Star’s counterclaim. “No Texas court has ever held that the duty to defend includes the duty to pay legal fees incurred in the course of prosecuting affirmative claims that are inextricably intertwined with the defense.” *Aldous v. Darwin Nat’l Assurance Co.*, 851 F.3d 473,

483 (5th Cir. 2017), *vacated in part on reh'g*, 889 F.3d 798 (5th Cir. 2018).¹ The Fifth Circuit so noted in a case arising under Texas law where an insured sought coverage for affirmative claims that were “inextricably intertwined with her defense.” *Id.* The court ruled that though an insurer has a duty to defend an entire suit (including particular claims that are not covered) if the complaint alleges a potentially covered claim, this “does not give rise to a duty to prosecute claims helpful to or even inextricably intertwined with that defense.” *Id.*; *see also Mustang Tractor & Equip. Co. v. Liberty Mut. Ins. Co.*, No. CIV. A. H-91-2523, 1993 WL 566032, at *9 (S.D. Tex. Oct. 8, 1993), *aff'd*, 76 F.3d 89 (5th Cir. 1996) (rejecting the proposition that a counterclaim should be covered because the best defense is a good offense).

A line of Fifth Circuit cases finding a duty to defend in affirmative actions is distinguishable on the basis that those cases involved claims for money that an alleged tort victim withheld from the insured. In *Simon v. Maryland Casualty Co.*, 353 F.2d 608, 610 (5th Cir. 1965), an insured sought to collect from its insurer costs associated with its affirmative claim against the United States Government, who withheld payment as damages caused by the insured. The insured filed suit against the Government for the withheld amount, but because the court found the insured negligently damaged the Government, the Government prevailed. *Id.* The insured then sued its insurer seeking a declaration of the insurer’s obligation to defend the insured in the claim the insured instituted. *Id.* The Fifth Circuit, finding this within the insurer’s duty to defend, noted that the claim was for funds withheld as a result of an allegation of negligence against the insured. *Id.* at 611. Similarly, in *Spec’s Family Partners, Ltd. v. Hanover Insurance Co.*, No. CV H-16-438, 2019 WL 3302816, at *9 (S.D. Tex. July 23, 2019), the insured’s affirmative claim was covered

¹ On rehearing, the panel vacated part of its prior ruling. *See Aldous v. Darwin Nat’l Assurance Co.*, 889 F.3d 798, 799 (5th Cir. 2018) (discussing developments under Texas law with respect to the independent injury rule). This leaves the Fifth Circuit’s prior decision regarding the scope of an insurer’s duty to defend intact.

where a counterparty withheld money from the insured and served the insured with demand letters.

Id.

These cases are inapposite because each involves the insured's attempt to recover withheld funds related to an alleged legal claim against the insured. In the instant case, by contrast, Blue Star seeks to extend Vibrant's duty to defend to claims not limited to its own liability. Unlike both *Simon* and *Spec*'s, Blue Star's affirmative claim did not function to resolve only the question of its liability. That is to say, in both *Simon* and *Spec*'s, the affirmative claim would only resolve the insured's liability in a potentially covered claim. (Record.) In the instant case, Blue Star's affirmative claim resolves not only its own liability but also Blue Star's liability. So unlike the insureds in *Simon* and *Spec*'s, Blue Star stood to gain (in the form of damages or an injunction) through successful prosecution of its affirmative claim beyond avoiding a loss through a finding of Blue Star's liability.² See 5 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 30:1 (5th ed. 2019) (noting that an injunction is the standard remedy in trademark infringement cases). The above Fifth Circuit precedent makes clear that an insured may not gain through "loss" in this manner.

The language of the Supplementary Payments Section belies the notion that counterclaim costs are covered because the costs of prosecuting the counterclaim are not expenses incurred at the request of Vibrant. "We cannot adopt a construction that renders any portion of a policy meaningless, useless, or inexplicable." *Aubris Res. LP v. St. Paul Fire & Marine Ins. Co.*, 566 F.3d 483, 486 (5th Cir. 2009). In addition to being outside the scope of coverage, Vibrant explicitly disclaimed responsibility for the counterclaim expenses in the reservation letter, and there is no

² This implicates an oft-used maxim in the insurance industry that beneficiaries should not gain through loss because the purpose of insurance is indemnification, not speculation. See, e.g., Tom Baker et al., *Insurance Law and Policy: Cases and Materials* 306 (5th ed. 2021) (discussing the centrality of the concept of indemnity in insurance).

evidence that Blue Star, who filed the counterclaim before notifying Vibrant of the claim against it, undertook the counterclaim at Vibrant's behest. (Record.) To require compensation for these expenses would render the "at our request" language useless.

II. Vibrant Did Not Breach Its Duty to Defend Because It Paid Reasonable Defense Costs.

Vibrant's reservation letter did not breach its duty to defend Blue Star. Where an insurer in good faith reserves its rights because it believes the complaint alleges conduct not covered by the policy, it has complied with its duty to defend, provided such reservation is clear and timely. *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 120 (5th Cir. 1983); *see also Am. Eagle Ins. Co. v. Nettleton*, 932 S.W.2d 169, 174 (Tex. App. 1996), *writ denied* (Jan. 31, 1997) (applying the same rule). A reservation of rights is effective where it apprised the insured of the insurer's position with respect to coverage and the insured's rights. *Ideal Mut. Ins. Co. v. Myers*, 789 F.2d 1196, 1201 (5th Cir. 1986); *see also Hous. Auth. v. Northland Ins. Co.*, 333 F. Supp. 2d 595, 600 (N.D. Tex. 2004) ("An insurer properly reserves its rights when it has a good faith belief that the tendered claim may involve conduct for which the policy does not provide coverage. In such a situation, reservation of rights will not be a breach . . .").

Here, Vibrant had a good faith belief that the policy would not cover some of the alleged conduct and so informed Blue Star in its reservation letter, yet Vibrant tendered a defense. (Record.) As such, the reservation letter was sufficient to inform Blue Star of Vibrant's position and was the product of good faith belief that "the tendered claim may involve conduct for which the policy does not provide coverage." *Id.*

Vibrant's reservation letter was timely because the delay was not prejudicial to Blue Star. In *Myers*, 789 F.2d at 1202, the Fifth Circuit found that a reservation letter was timely, despite being delivered two years after the crash at the root of the claim and notice from the insured's estate

because the insureds failed to demonstrate prejudice from the delay. Similarly, in *American International Specialty Lines Insurance Co. v. Res-Care, Inc.*, No. CV H-00-2338, 2003 WL 27385572, at *7 (S.D. Tex. Mar. 31, 2003), the court found a reservation of rights letter sent nineteen months after the underlying litigation was filed could be timely because there was a question of fact as to whether the insureds were prejudiced.

Similarly, here, Blue Star was not prejudiced by Vibrant's delay in sending the reservation letter. Blue Star had already retained counsel and was litigating prior to even notifying Vibrant of the claim against it. (Record.) Vibrant sent its reservation letter before the end of the underlying proceeding. And when Vibrant tendered defense counsel, Blue Star opted to continue with its already retained counsel. (Record.) There is no indication that Blue Star's litigation position was weakened by the time Vibrant took to issue its letter. (Record.) In the absence of any showing of prejudice, Vibrant's letter was timely as a matter of law.

Vibrant is not liable for any pre-tender costs. "[T]he duty to defend does not arise until a petition alleging a potentially covered claim is tendered to the insurer." *Lafarge Corp. v. Hartford Cas. Ins. Co.*, 61 F.3d 389, 400 (5th Cir. 1995); *see also* 14 Jordan Plitt et al., *Couch on Insurance* § 200:35 ("Unless the insurance contract provides otherwise, an insurer is only responsible for defense costs incurred after tender of the suit."); *Gemmy Indus. Corp. v. All. Gen. Ins. Co.*, 190 F. Supp. 2d 915, 921 (N.D. Tex. 1998) ("[T]imely notice is a condition precedent to an insurer's liability under the policy."), *aff'd sub nom. Gemmy Indus. Corp. v. All. Gen. Indus. Co.*, 200 F.3d 816 (5th Cir. 1999).

Regarding post-tender claims, the Supplementary Payments section covers in relevant part "[a]ll reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or 'suit'." (Record.) The policy does not define "reasonable expenses," so the

words “are given their ordinary and generally-accepted meaning unless the policy shows the words were meant in a technical or different sense.” *Terry Black’s Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450, 455 (5th Cir. 2022).

That Vibrant and its auditor did not use intellectual property specialists in reviewing the reasonableness of the fees is irrelevant. Auditing of legal fees is a common practice in the insurance industry. *See generally* Claire Hamner Matturro, *Auditing Attorneys’ Bills: Legal and Ethical Pitfalls of a Growing Trend*, 73 Fla. Bar J. 14 (1999) (discussing the expanding use of auditing). And in reviewing the reasonableness of fees, courts do not require expert or specialist testimony regarding the fees charged. *See City of Laredo v. Montano*, 415 S.W.3d 1, 4-6 (Tex. App. 2012) (determining the reasonableness of fees without expert testimony). Of the factors considered in determining the reasonableness of fees, several are easily examined, without expert testimony, based on market analysis (e.g., fees customarily charged) or consideration of the underlying claim (e.g., the amount in controversy). *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

III. The Burden is on Blue Star to Establish the Reasonableness of Attorney’s Fees, and Vibrant Can Contest Reasonableness.

Where there is no breach of the duty to defend, an insured has no right to recover attorney’s fees. Where an insurer complied with its duty to defend, an insured was not entitled to attorney’s fees incurred in underlying litigation because such fees “are damages produced by the insurer’s breach of its duty to defend.” *Partain v. Mid-Continent Specialty Ins. Servs., Inc.*, 838 F. Supp. 2d 547, 572 (S.D. Tex. 2012), *aff’d sub nom. Graper v. Mid-Continent Cas. Co.*, 756 F.3d 388 (5th Cir. 2014). Without a predicate breach, the insured is not entitled to fees as damages. *Id.*

Alternatively, if the court finds that Vibrant breached its duty to defend, Blue Star’s damages are limited to fees that were reasonable and necessary. “Texas courts have held that attorney’s fees

incurred involving litigation with a third party are recoverable as actual damages.” *Am. Home Assurance Co. v. United Space All., LLC*, 378 F.3d 482, 490 (5th Cir. 2004) (citation omitted). “However, these courts have also held that attorney’s fees sought to be recovered as damages must be reasonable and necessary.” *Id.* (citation omitted).

Even if Vibrant breached its duty, Blue Star has the burden to demonstrate that costs incurred by the insured were reasonable. The Fifth Circuit required a beneficiary whose insurer did not participate in its defense to demonstrate that the settlement the insured reached without the insurer was reasonable in order to require reimbursement. *See Rhodes v. Chi. Ins. Co.*, 719 F.2d 116, 120 (5th Cir. 1983) (“[A]n insurer who wrongfully fails to defend its insured is liable for any damages assessed against the insured, up to the policy limits, subject only to the condition that any settlement be reasonable. The insured must demonstrate only that, in settling, his conduct conformed to the standard of a prudent uninsured.”). In a breach of duty to defend action where a jury awarded attorney’s fees without evidence supporting the reasonableness and necessity of those fees, the Fifth Circuit granted JNOV in favor of the insurer. *Am. Home Assurance Co. v. United Space All., LLC*, 378 F.3d 482, 491 (5th Cir. 2004). “[P]roof of the internal approval process involved in authorizing the payment of the attorney’s fees, and the amount of fees that had actually been paid” was insufficient to support the claim for fees. *Id.* Blue Star must provide evidence supporting the reasonableness of fees.

CONCLUSION

[OMITTED FOR BREVITY]

Applicant Details

First Name	Robert
Last Name	McCarthy
Citizenship Status	U. S. Citizen
Email Address	rm6082@nyu.edu
Address	<div> <div>Address</div> <div> <div>Street</div> <div>36 Locust St</div> <div>City</div> <div>Garden City</div> <div>State/Territory</div> <div>New York</div> <div>Zip</div> <div>11530</div> </div> </div>
Contact Phone Number	5165106673

Applicant Education

BA/BS From	University of Virginia
Date of BA/BS	May 2018
JD/LLB From	New York University School of Law
	https://www.law.nyu.edu
Date of JD/LLB	May 22, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Journal of Legislation and Public Policy
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Liebman, James S.
jliebman@law.columbia.edu
212-854-3423

Sexton, John
john.sexton@nyu.edu
212-992-8040

Sharkey, Catherine
catherine.sharkey@nyu.edu
212-998-6729

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Robert McCarthy
36 Locust Street
Garden City, NY 11530

June 12, 2023

The Honorable Zahid Quraishi
United States District Court for the District of New Jersey
Clarkson S. Fisher Building & U.S. Courthouse
402 East State Street
Trenton, NJ 08608

Dear Judge Quraishi:

I am a second-year student at New York University School of Law and an Executive Editor for the *Journal of Legislation and Public Policy*. I am writing to apply for a 2024 - 2025 term clerkship in your chambers. I

Attached are my resume, law school, graduate school, and undergraduate transcripts. Additionally, I have submitted an unedited writing sample. Professors John Sexton, Jim Liebman, and Catherine Sharkey wrote letters of recommendation in my support.

If there is any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Robert McCarthy

ROBERT THOMAS MCCARTHY
36 Locust St., Garden City, New York 11530
(516) 510-6673; rm6082@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, New York

Candidate for J.D., May 2024

Honors: *Journal of Legislation and Public Policy*, Executive Editor

Activities: Student Bar Association, Senator
Law Revue, Actor, Writer, and Producer
Parole Preparation Project, Student Advocate

UNIVERSITY OF NOTRE DAME, Notre Dame, Indiana

M.Ed., May 2020

UNIVERSITY OF VIRGINIA, Charlottesville, Virginia

B.A. in Leadership & Public Policy, Religious Studies, May 2018

Honors: Graduation Speaker, Dean's List

Activities: Batten Undergraduate Council, President

EXPERIENCE

KING & SPALDING LLP, New York, NY

Summer Associate, Summer 2023

Participate in all aspects of complex commercial litigation and international arbitration, including research for a motion in limine and a motion to dismiss. Research includes projects on product liability; contributory infringement of pharmaceutical drugs; and enforcement of arbitral awards under New York Convention. Actively sought out and prioritized pro bono matters.

CENTER FOR PUBLIC RESEARCH AND LEADERSHIP, New York, NY

Graduate Student Associate, Fall 2022

Participated in all aspects of writing a report assessing Delaware's implementation of high-quality instructional materials on students' learning. Facilitated over 20 interviews with educators, conducted 10 teacher observations, researched education law, and wrote and edited final report distributed throughout Delaware.

PROFESSOR CATHERINE SHARKEY, NYU SCHOOL OF LAW, New York, NY

Research Assistant & Teaching Assistant, June 2022 – March 2023

Researched, substantiated, and edited Prof. Sharkey's book review of *Tort Law and the Construction of Change for Virginia Law Review*. Collaborated with Prof. Sharkey to revise syllabus and lead seven review sessions.

PROFESSOR CATHERINE SHARKEY, NYU SCHOOL OF LAW, New York, NY

Research Assistant, June 2022 – February 2023

Conducted extensive legal research in civil procedure; updated Wright & Miller's Federal Practice and Procedure treatise 14AA (Amount in Controversy).

NASSAU COUNTY LEGISLATURE, Garden City, NY

Candidate for County Legislature – Legislative District 14, March 2021 – November 2021

Developed detailed policy proposals including on community safety. Raised over \$20,000 from 200 donors. Knocked on 3,750 doors. Appeared on two national podcasts to discuss my experiences and civility in politics.

CATHEDRAL SCHOOL OF THE ANNUNCIATION, Stockton, CA

Third Grade Teacher, August 2018 – May 2021

Earned Master's in education while serving as a full-time teacher. Presented at Advancing Improvements in Education, a national conference, to over 30 teachers on how to best empower students living with trauma.

ADDITIONAL INFORMATION

Studied post-genocide peace building in Kigali, Rwanda (January – May 2016). Enjoy marathon running (kind of), baking, biking, and liberation theology.

Name: Robert McCarthy
 Print Date: 06/04/2023
 Student ID: N19720211
 Institution ID: 002785
 Page: 1 of 1

**New York University
 Beginning of School of Law Record**

Fall 2021

School of Law Juris Doctor Major: Law				
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Colleen P Campbell			
Criminal Law		LAW-LW 11147	4.0	B
Instructor:	Randy Hertz			
Procedure		LAW-LW 11650	5.0	B
Instructor:	Arthur R Miller			
Contracts		LAW-LW 11672	4.0	B-
Instructor:	Kevin E Davis			
1L Reading Group		LAW-LW 12339	0.0	CR
Instructor:	John Sexton			
		<u>AHRS</u>	<u>EHRS</u>	
Current		15.5	15.5	
Cumulative		15.5	15.5	

Spring 2022

School of Law Juris Doctor Major: Law				
Constitutional Law		LAW-LW 10598	4.0	B
Instructor:	Melissa E Murray			
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Colleen P Campbell			
Legislation and the Regulatory State		LAW-LW 10925	4.0	B+
Instructor:	Adam M Samaha			
Torts		LAW-LW 11275	4.0	A
Instructor:	Catherine M Sharkey			
1L Reading Group		LAW-LW 12339	0.0	CR
Instructor:	John Sexton			
Financial Concepts for Lawyers		LAW-LW 12722	0.0	CR
		<u>AHRS</u>	<u>EHRS</u>	
Current		14.5	14.5	
Cumulative		30.0	30.0	

Fall 2022

School of Law Juris Doctor Major: Law				
Teaching Assistant		LAW-LW 11608	2.0	CR
Instructor:	Catherine M Sharkey			
Education Sector Policy and Consulting Clinic		LAW-LW 12446	7.0	A
Instructor:	James S Liebman			
Education Sector Policy and Consulting Clinic Seminar		LAW-LW 12447	7.0	A
Instructor:	James S Liebman			
		<u>AHRS</u>	<u>EHRS</u>	
Current		16.0	16.0	
Cumulative		46.0	46.0	

Spring 2023

School of Law Juris Doctor Major: Law				
Colloquium on Law, Economics and Politics of Urban Affairs: Writing Credit		LAW-LW 10321	1.0	A-
Instructor:	Vicki L Been			
Colloquium on Law, Economics and Politics of		LAW-LW 10634	2.0	A-

Urban Affairs

Instructor:	Vicki L Been			
Antitrust Law		LAW-LW 11164	4.0	B
Instructor:	Christopher Jon Sprigman			
Property		LAW-LW 11783	4.0	B
Instructor:	David Jerome Reiss			
Business Torts: Defamation, Privacy, Products and Economic Harms		LAW-LW 11918	4.0	B+
Instructor:	Catherine M Sharkey			
		<u>AHRS</u>	<u>EHRS</u>	
Current		15.0	15.0	
Cumulative		61.0	61.0	
Staff Editor - Journal of Legislation & Public Policy 2022-2023				

End of School of Law Record

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in strong support of Robert McCarthy's application for a clerkship.

As an NYU Law student, Robert spent an intensive semester in the Education Sector Policy and Consulting Clinic that I lead. This program selects law, business, education, policy, and data sciences students from multiple professional schools nationwide to spend a semester together studying and leading legal and policy research and consulting projects on the organization, governance, and regulation of public-sector institutions with a particular focus on the nation's public education systems. From this vantage point, I am able to observe my students' analytic acuity, expository writing, and oral contributions in a deeply conceptual, seven-credit seminar-style exploration of the structure, design, and transformation of public-sector institutions, as well as their capacity for practical application of what they're learning in team-based multi-disciplinary projects on behalf of public agencies. In Robert's case, the project work was on behalf of a state department of education endeavoring to embed in legislation, regulations, and practices a new approach to the selection of and preparation of educators and students to make effective use of high-quality instructional materials in literacy, mathematics, and science.

Robert came to the program with a strong interest in the lawyer's role in developing and advancing public policy, particularly at the state and local level, and with a special interest in New York City and State. In the seminar portion of the program, Robert was a regular and reliable participant in class discussions. His comments were smart and efficient. He always was well-prepared, demonstrated a strong grasp of the readings including the more conceptual ones that some of the other students struggled with, strove to put the ideas together in his own way and form his own judgments, and revealed a knack for bringing his own experiences—particularly as an elementary school teacher and a candidate for local office—productively to bear. His writing was strong, practical, and accessible to multiple audiences.

In the intensive and time-pressured project work, with high quality demands (our institutional clients pay for our services and demand strong work), Robert again generated effective written work well-targeted to the client, consistently met deadlines, responded quickly and well to feedback, effectively edited other students' work, and often took on late-appearing tasks that his efficient work on his own assignments freed him up to cover. His gentle and respectful manner, consideration for his teammates, sense of humor, and (again) his facility for clarifying matters by drawing on his own experiences, made him an especially valued colleague. His teammates' evaluations of Robert are filled with encomia both about his practical role on the team (keeping the focus on the question at hand, the client's needs, and the best way to make matters salient to the client) and his manner ("kind, open and thoughtful," "a key part of our team morale," "lit up the room and kept us positive and focused").

It was only partway through the semester that I realized that, at the same time as Robert was performing so well in and contributing so productively to all aspects of the program, he was also training for—and during the semester ran—the New York marathon. In conversations outside of class, I also found that Robert was avidly tracking and thinking about a variety of policy issues affecting local and state government, with a focus on environmental as well as public education issues. Robert's capacity for managing his time, and for keeping a broad perspective on his professional and personal interests, add to my admiration for him as a student and colleague.

For these reasons, I believe Robert would make a terrific law clerk, and I strongly recommend him for that position.

Please let me know if I can provide any other information.

Sincerely,
James S. Liebman

James S. Liebman - jliebman@law.columbia.edu - 212-854-3423

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in support of the candidacy of Robert McCarthy for a clerkship in your chambers.

Robert, currently a student at NYU Law School, is a 2018 graduate of the University of Virginia graduate (where he was the graduation speaker) and a 2020 graduate of the University of Notre Dame. His resume clearly reflects that Robert is a person of substance, but what is less clear is Robert's enormous intellect and his extraordinary work ethic. He consistently supplements his classroom achievements with co-curricular work, and has fully engaged himself not only in the life of the law but also in the life of the legal academy.

I first met Robert when he enrolled in my 1L Reading Group titled "Baseball as a Road to God: Seeing Beyond the Game." This Reading Group, based on a seminar I have taught for more than a decade, links literature about our national pastime with the study of philosophy and theology. It explores ideas contained in classic texts such as Coover's Universal Baseball Association, Kinsella's Iowa Baseball Confederacy, and Malamud's The Natural with those found in philosophical and theological works such as Eliade's Sacred and Profane, Heschel's God in Search of Man, and James' Varieties of Religious Experience. It discusses such themes as the metaphysics of sports, the notions of sacred time and space, and the idea of baseball as a civil religion.

Robert excelled in the Reading Group. Indeed, his performance was exemplary, demonstrating exceptional ability in analyzing the assigned works and in presenting thoughtful oral arguments and analyses. Further, he made connections between the seminar materials and a far broader, interdisciplinary horizon. For example, even before the first meeting of the group, Robert wrote to me, indicating that he had pursued religious studies and public policy in college and then spent three years teaching 3rd grade at a Catholic school, so he often found himself grappling with questions of both what religious experience is and the various ways religious experience shapes individual and communities. This message was the first in a number of robust and dynamic exchanges and meetings which continue even now: Robert and I were in touch just a couple of weeks ago.

In fact, I was sufficiently impressed with Robert's work in the Reading Group that I invited him to work with me as my Teaching Assistant for the "Baseball as a Road to God" undergraduate seminar this forthcoming Fall Term. I have every confidence he will bring the same enthusiasm to the classroom for the undergrad students, and I look forward to working with him.

Robert is deeply engaged not only in the academic life of the law, but also the wider law school community. For example, he participated in the Parole Preparation Project, which assists those incarcerated to prepare for parole hearings. As Robert described it, he spent time on this project because he sought an opportunity to engage with client advocacy. He also is the incoming Executive Editor of the Journal of Legislation and Public Policy, because he indicated he wants to work closely with the development of scholarship.

In my view, Robert is an ideal candidate. He is intellectually keen and inquisitive, he is experienced in both the substantive law and scholarship, and he has demonstrated experience working effectively not only as an individual but also as an integral part of a team. It is for all these reasons it is my pleasure to write in support of his candidacy.

Sincerely,

John Sexton

John Sexton - john.sexton@nyu.edu - 212-992-8040

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Robert McCarthy for a clerkship in your chambers. I first came to know Robert as a student in my 1L Torts class during the Spring 2022 semester, in which he earned an A. Based on his strong performance in Torts, I asked Robert to be the head/coordinating Teaching Assistant (TA) for the Fall 2022 semester, as well as a Research Assistant (RA), and am glad to have done so. Robert was also a student in my Business Torts class this past semester, in which he earned a B+.

As the head Torts TA, Robert was instrumental in ensuring all TA meetings ran smoothly, and gladly assisted me with all logistical aspects of running the class without complaint. On a substantive level, he proved extremely capable in assisting me in reviewing and suggesting helpful updates to the negligence section of the course syllabus. As was shown in their course evaluations, the students assigned to his discussion section were extremely appreciative of Robert's review sessions, and his ability to explain even the most challenging aspects of the material addressed in class.

Robert's work as an RA also proved helpful to me. He assisted me with research in connection with a book review I was writing, and in particular identified helpful case law that addressed the role and impact of insurance in tort law. Robert was consistently on time with his work and receptive to my guidance towards additional research avenues. He also helped me with final edits to the book review on a tight deadline that, moreover, required intensive work over a holiday weekend.

Robert was a strong participant in my Business Torts class, and his final paper was an interesting exploration of the role of common law defamation in reinforcing or negating societal prejudices.

On a personal level, Robert is a mature, enthusiastic, and personable young man who is a pleasure to work with. He takes his responsibilities seriously and is highly receptive to, and adept at integrating, constructive feedback. I believe Robert would be a valuable asset to your chambers, and I hope you will seriously consider him as a candidate.

Sincerely,
Catherine M. Sharkey
Segal Family Professor of
Regulatory Law and Policy

Catherine Sharkey - catherine.sharkey@nyu.edu - 212-998-6729

Robert McCarthy

rm6082@nyu.edu; 516-510-6673

Writing Sample

This writing sample is a final paper, which I wrote for Prof. Catherine Sharkey's Business Torts: Defamation, Privacy, Products and Economic Harms. The paper examines how society and common law interact, particularly in regards to sexuality and defamation. This sample is my original work product with no edits or feedback for a third party.

Courts both shape and are shaped by public opinion. After all, judges are members of society, capable of both setting aside prejudices and succumbing to them. As a result, culture influences common law, influencing what is and what is not a tort. Defamation, a notoriously imprecise tort even according to Prosser,¹ shows the interplay between society influencing tort and society influenced tort. With the noble tradition of common law comes noble responsibility. For this reason, judges should no longer recognize a statement that states someone is not straight as defamatory, and this should apply to both *per se* and *per quod* defamation. Sexuality-based defamation should no longer be actionable because courts should neither assume nor find reputational or economic harm.

Courts should not be open forums to litigate sexuality, including what sexuality is and what sexuality isn't. While the contours of sexuality can be debated, one way to conceptualize sexuality is in its division of status and conduct. Since *Bowers v. Hardwick*, and even before, the courts inability to grapple with these questions has been clear. In the past, courts were willing to deem the mere invocation that someone is gay, lesbian, or bisexual as *per se* defamatory, meaning that courts participated in condemning status. Both conduct and status should be beyond the reach of defamation. One way of expressing sexuality is as a private aspect of one's identity, even if many individuals choose to live their sexuality publicly. However, just because the majority of individuals choose to live their sexually publicly does not mean that the ability for someone to keep this private should not be respected by the courts.

While courts once found defamatory claims actionable when acts of homosexuality were criminalized, courts must interpret the law with an eye towards societal realities. At the same time, courts should not discard all precedent. Yet, sexuality-based defamation serves a double

¹ Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 691 (1986).

bind by ensuring straight people can recover and reinforcing negative stereotypes. No one likes having inaccurate statements spread about oneself, and courts are not removing all causes of action; privacy related torts can fill in the gap, leaving the correct cause of action intact for individuals who are either straight or a sexual minority.² In order to most convincingly make these arguments, the roadmap is as follows.

First, defamation and what interests it protects will be explored. Second, cases that show the interaction between sexuality and defamation will be prodded and compared. Third, privacy related torts will be offered as torts that allow recover without reinforcing prejudicial thinking. Finally, specific examples of how privacy torts may cover this space will be presented.

First, jurisdictions often divide defamation into two categories: *per quod* or *per se*.³ A *per se* defamatory publication involves “statements so harmful to reputation that damages are presumed.”⁴ On the other hand, *per quod* defamatory publication involves “statements requiring extrinsic facts to show their defamatory meaning.”⁵ While each state defines *per se* slightly differently, the categories are quite similar.

As articulated in *Muzikowski*, common law in Illinois offers five categories of *per se* defamation: criminal offense, infection with a venereal disease, inability or corruption in public office, fornication or adultery, or prejudice in trade, profession or business.⁶ In New York, the “four established ‘per se’ categories recognized by the Court of Appeals are ‘statements (i)

² In culture, “straightness” has been presented as normative, and “nonstraightness” as a derivation of the norm. Defamation is a value laden tort, relying on the premise that one feels inferior or shameful, and this needs to end. Sexual minority was used above to be the most inclusive term but throughout this paper gay, lesbian, and bisexual are most often used. Two notes deserve mention. First, this is not to imply the challenges of people whose sexualities are not listed have not been defamed, and defamation for all sexual identities should end. Second, the burgeoning social movement for acceptance will likely not be for sexuality-based rights but gender-based rights. While there are certain areas of overlap, this overlap is not complete. In offering a roadmap for ending defamation for sexuality-based defamation, hopefully principles can be applied to an analogous, but not identical, overdue social movement.

³ *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918, 924 (7th Cir. 2003).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

charging [a] plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that [a] plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman.”⁷ Historically, same-sex activity would be criminalized. Contemporarily, figuring out where stating that someone is gay, lesbian, or bisexual fits in is challenging.

Defamation has two major elements: publication and defamatory statements. While each court may slightly tweak the exact definition of defamation in their jurisdiction, defamation must always include unprivileged publication to a third party.

RST § 577 explains that publication is “communication intentionally or by a negligent act to one other than the person defamed.” Further, liability extends when someone “intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control.” At times, the definition of publication might seem incongruous, or even changing itself. For example, in *Mimms v. Metropolitan Life Ins. Co.*, the 5th Circuit did not find publication. In this case, Mimms asked Alabamian Sen. Sparkman to write a letter to Metropolitan Life Insurance Co. asking why Mimms was fired. Disagreeing with New York precedent that would categorize a stenographer as a third party, the 5th Circuit holds that both the president and the stenographer were acting as one corporate agent of Metropolitan Life. Therefore, they could not be treated as a third party. Further, the court did not find Sen. Sparkman to be a third party because he was acting as Mimms’s agent. In dissent, Judge Rives explains that he found a third party in both to the stenographer and Senator Sparkman.

While most cases involving sexuality will not quibble over what constitutes publication, *Mimms* instructs in another way by underscoring that courts will whittle common law. In this case, precedent was modified, offering a shield for a corporation on an “agent” theory, where concerted effort would neutralize the existence of a third party. Similarly, courts can look at

⁷ *Yonaty v. Mincolla*, 97 A.D.3d 141, 144 (2012).

defamation *per se* and state their resistance to assuming damages. After all, if the meaning of publication is open to debate and responsive to the growth of corporations, what constitutes damage should be up to debate and responsive to the (long overdue) acceptance of lesbian, gay, and bisexual individuals.

The second element of defamation is a defamatory statement. According to the RST § 588 defamation includes the following elements: a false and defamatory statement, fault, and harm. Implicit in this understanding is the duty not to defame, but what is not clear is how society would define defamation. In order to determine what is defamatory, what constitutes acceptance and what constitutes community must be answered.

In regards to acceptance, both acceptance of marriage and moral acceptability can show national opinion. A May 2022 Gallup survey showed, 71% of surveyed individuals thought same-sex couples should have their civil marriages recognized while 28% did not.⁸ These numbers should be compared to an almost complete inversion from the 1996 May Gallup poll where 27% of surveyed individuals viewed same-sex civil marriage as valid while 68% did not.⁹ These statistics parallel general moral acceptance of gay and lesbian relations, with 71% of surveyed individuals saying gay and lesbian relations are “morally acceptable” and 25% of surveyed people saying these relationships were “morally unacceptable.”¹⁰ Court have shifted in other ways relating to sexuality, including in jury instructions for criminal cases. Whether as a mitigating consideration or a complete defense, courts once considered a same-sex advance to be a reasonable provocation for murder.¹¹

⁸ Gallup. In Depth: Topics A to Z - LGBT Rights. <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Joshua Dressler, *When Heterosexual Men Kill Homosexual Men: Reflections on Provocation Law, Sexual Advances, and the Reasonable Man Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 726-27 (1994-1995).

Courts should not wait until 100% of people surveyed support same-sex marriage or find these relationships morally acceptable. Waiting for a threshold of 100% seems both impractical and strained. Further, courts will operate within the bounds of society and should not be viewed as activists or unelected legislators with a 70% support rate. With these levels of social acceptance, harm should not be assumed for *per se* defamation. In fact, courts should not be bound by previous minoritarian judicial thinking and should not accept harm for *per quod* sexuality-based defamation. Courts need to fully condemn thinking that allows being called lesbian, gay, or bisexual to be defamatory.

In the past, courts have declared *per se* defamation for causes of action that society would certainly not view as defamatory today. For example, the Supreme Court of South Carolina upheld that misidentifying a white person as Black could lead to liability for *per se* defamation.¹² In ruling, the court explained that being misidentified as Black impacts one's standing in society and brings one down in the estimation of friends.¹³ In so doing, the Supreme Court of South Carolina further reinforced racism in its courts and its laws. As evidenced by this, courts exist in their communities. If courts continue to accept claims of defamation when discussing people's sexuality, courts will reinforce homophobia. Allowing a defamation action strikes at principles of equality.

As far as determining the "community," two questions should be probed, both of which can be done briefly. First, what community should be used? Second, should defamation be able to apply to communities?

First, there should be a national standard to apply. Statistically, the nation accepts same-sex relationships. While some states, such as New York, may exceed the national average, and

¹² *Bowen v. Independent Publishing Company*, 230 S.C. 509, 513 (1957).

¹³ *Id.*

some states, such as Mississippi, may be below, a national standard should be pursued. In many ways, this implicates the “reasonable” or “ordinary” person standard. Indeed, when data shows what an ordinary person thinks, the ordinary person may best be a national ordinary person. Mindful of the past interventions of the United States Supreme Court in defamation law, this does not serve as an invitation for intervention.

Common law has a role to play in recognizing people’s rights. The next wave of defamation may not rest with sexuality-based actions but gender-based actions. Once again, the courts should step in and note that being called transgender is not a form of defamation.¹⁴ The court needs to recognize the psychological, moral, and political messages sent by what it defines as defamation.

Second, defamation will almost always refer to an individual in order to meet the “of and concerning” element. However, in a few instances, group defamation has been found actionable. In *Elias v. Rolling Stones LLC*, for the first time, the Second Circuit formally recognized that small group defamation existed. Judge Lohier held that subsequently proven false accusation in a *Rolling Stones* article about of a fraternity of 57 members at the University of Virginia committing sexual assault could be considered “of and concerning” the plaintiffs. While this logic applied well to this case, it must be contained. Well before *Elias*, precedent exists in the Second Circuit in *Neiman-Marcus v. Lait*.¹⁵ Here, the court held that a cause of action existed to allow a class-action defamation suit involving claims that a group of twenty-five employees was composed of mostly gay men. *Neiman-Marcus* serves as a forerunner to *Elias* in recognizing group defamation. Both *Elias* and *Neiman-Marcus* show the importance of having small groups

¹⁴ Indeed, this proposition animates *Simmons v. American Media, Inc.*, No. BC660633, 2017 WL 5325381 (Cal. Super. Sept. 1 2017). The opinion notes “even if there is a sizable portion of the population who would view being transgender as negative, the court should not... ‘directly or indirectly, give effect to these prejudices.’”

¹⁵ 13 F.R.D. 311 (S.D.N.Y. 1952).

where defamatory statements have a high degree of fungibility and could apply to anyone. If a publication of sexuality should no longer be considered defamatory for an individual, rather logically, a publication of sexuality should not be considered defamatory for a group.

Both acknowledging the inherent confusion and seeking to bring order to this confusion, Robert Post offers three frames to conceptualize what defamation protects: honor, dignity, and property.¹⁶ While all three lens offer important viewpoints into defamation, dignity presents the strongest case for ending defamation in regards to sexuality. Quoting Justice Stewart's concurrence in *Rosenblatt v. Baer*, Post notes the challenges of conceptualizing dignity, despite Justice Stewart's poetic invocation of "our basic concept of the essential dignity and worth of every human being."¹⁷ This dignity manifests itself as respect and self-respect.¹⁸ Traditionally, defamation protects dignity by preventing belittling. Being called something you are not is painful. Being defamed is painful, but being called lesbian, gay, or bisexual should be neither defamatory nor painful. The statements should be neutral, much like a statement incorrectly stating someone's eye color. Therefore, in this instance, the courts upholding sexuality-based claims as defamatory serves as the wrong.

Of course, defamation conversations in the United States take place in the long and pervasive shadow of *New York Times v. Sullivan* and its progeny. In its constitutionalization of defamation, *New York Times* froze and sullied the reputable common law tradition. Legislatively, section 230(c) Communications Decency Act of 1996 extended protections to the then fledgling Internet, also limiting defamation liability. However, the protections offered by the Communications Decency Act of 1996 may be modified this summer by the Supreme Court, and there is an appetite to reconsider the precedent from *New York Times v. Sullivan*. Algorithms

¹⁶ Robert Post, *supra* note 1, at 693.

¹⁷ *Id.* at 707, quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

¹⁸ *Id.* at 711.

implicate interesting questions in regards to privacy (i.e., does a suggested ad or mailing invade on privacy?). Safe to say, the Internet without the ability to target ads via data because of privacy concerns would look quite different. As seen in the oral argument for *Gonzalez v. Google*, these questions play a large role in society, but judges are not the best equipped to answer them.

Second, previous cases exploring the relationship between sexuality and defamation should be brought into conversation to help elucidate the pitfalls of sexuality-based defamation claims. The first case comes from Massachusetts District Court in 2004, the subsequent pair of cases come from New York only four years apart, and these cases show how judges are interacting with societal opinion.

In *Albright v. Morton*,¹⁹ on a motion to dismiss, the judge wrote, “[i]n 2004, a statement implying that an individual is a homosexual is hardly capable of a defamatory meaning.”²⁰ The case took place after *Lawrence v. Texas* and the Supreme Judicial Court of Massachusetts declaring it unconstitutional in Massachusetts to not allow same-sex marriage. The opinion noted that upholding sexuality-based defamation is an act of prejudice and bigotry²¹ and that to acknowledge defamation here would reinforce the unjust second-class citizenship of same-sex couples.²² While, Albright attempts to recover under false light, a more appropriate and less value laden tort, the judge noted that Massachusetts does not recognize the tort of false light and refused to expand it for this case.²³

A diametrical opposed pair of New York cases, one in S.D.N.Y and one in state court, show how judges interact with common law. In the 2008 S.D.N.Y. case *Gallo v. Alitalia-Linee*

¹⁹ 321 F.Supp.2d 130 (2004).

²⁰ *Id.* at 132.

²¹ *Id.* at 133.

²² *Id.* at 138.

²³ *Id.* at 140.

Aeree Italiane-Societa per Azioni,²⁴ Gallo sought to recover under *per se* defamation after being called gay by his boss. The court explained that “certain people view homosexuality as particularly reprehensible”²⁵ even if “[t]he Court recognizes that many in our society no longer hold such beliefs ... homophobia is sufficiently widespread and deeply held that an imputation of homosexuality can—at least when directed to a man married to a woman—be deemed every bit as offensive as imputing unchastity to a woman.”²⁶ In a footnote, the judge offered, “[a]ll the sexual categories of slander *per se* appear somewhat outmoded in view of contemporary mores,”²⁷ but based on New York state court precedent, the judge noted both being confined and the challenge of interpreting rules upholding homophobia. While this plaintiff could not recover under intrusion upon seclusion (seemingly, his boss was a bigoted bully), the plaintiff could recover on false light. Noting his discomfort, the judge applied rather than shaped the common law. This judicial act upheld homophobia and underscores the need for courts to adapt to times.

Just four years later in the Second Division of the New York Supreme Court, *Yonaty v. Mincolla*²⁸ came to the exact opposite conclusion as *Gallo*. Here, the harm to Yonaty was quite clear as the defendant schemed to ensure that Yonaty’s girlfriend would hear a rumor that Yonaty was gay or bisexual, which ultimately set into motion the dissolution of Yonaty and his girlfriend’s relationship.²⁹ In response to Yonaty’s claim that being called gay or bisexual is *per se* defamation, the court flatly refused, and not just for one reason but for multiple. The court noted that being called gay was *per se* defamation in the past because this imputed shame, insinuated a “serious crime,” and occurred in a pre-*Lawrence* world.³⁰ Further, in disagreeing

²⁴ 585 F.Supp.2d 520 (2008).

²⁵ *Id.* at 549.

²⁶ *Id.*

²⁷ *Id.* at 555 n.16.

²⁸ 97 A.D.3d 141.

²⁹ *Id.* at 142.

³⁰ *Id.* at 144.

with another division of the New York Supreme Court, the court noted that “at this point in time” served as a previous justification.³¹ The point in time had shifted, and the courts felt no obligation to uphold the homophobia inherent in that decision. Opportunities for recovery will still exist as sexuality-based defamation fades to the history books.

Third, defamation should no longer encompass statements involving sexuality. Instead, plaintiffs should seek recovery under privacy related torts including intrusion upon seclusion, public disclosure of embarrassing private facts, and false light. While embarrassing does not carry the same baggage as defamation, referring to someone’s sexual identity as embarrassing is hardly a step forward. The harm should be recognized as force disclosure of private information, not being called lesbian, gay, or bisexual. False light, which comes with less laden and shame inducing words, can still stand as an option for straight individuals who were called lesbian, gay, and bisexual. After all, society should limit falsehoods.

Privacy is particular fitting as a cause of action because it may have served as the desire for Warren to team up with Brandies to write *The Right to Privacy*. Although debate swirls, the spark for Warren may have been protecting the privacy of his gay brother.³² Of course, the nobility of this act depends on whether Warren acted out of care or out of embarrassment. Conceptually, two essential questions are raised by empowering intrusion upon seclusion: who is owed this privacy and how should damages be calculated.

Privacy is a general duty owed but does not extend to all aspects of life. According to RST § 652B, the intrusion must be both intentional and highly offensive. While duty is the first step in analyzing negligence-based torts, for an intentional tort like intrusion upon seclusion, duty serves as an exoskeleton. If the realm of intrusion on seclusion is expanded too widely,

³¹ *Matherson v Marchello*, 100 A.D.2d 233, 241 (1984).

³² Sue Halpern. *Private Eyes*. NEW YORK REVIEW OF BOOKS. Mar. 9 2023, <https://www.nybooks.com/articles/2023/03/09/private-eyes-the-fight-for-privacy-citron/>.

conservations will be quite quiet, as they wouldn't be able to happen. As analogy, damages spring from ideas present in trespass to land where damages were assumed. This idea is more fully explored in *Boring v. Google Inc.*,³³ where taking a picture was analogized to physical trespass.

Using privacy-based torts addresses an incongruity currently embedded in the law: truth as complete defense. For example, if a newspaper were to publish a story with a photo captioned, "X is seen with his boyfriend taking advantage of a Restaurant Week," an act for defamation would open. If X were straight, he would be able to sue saying he was defamed. If X were gay and closeted, he would also be able sue, but the newspaper could invoke a defense of truth. Of course, this seems unlikely now, but this possibility still does exist. This argues for another reason why sexuality-based torts should be migrated strictly to privacy; operating under a privacy regime, as opposed to defamation regime, equalizes recovery for both straight and lesbian, gay, and bisexual individuals.

Further, privacy serves as a much more appropriate deterrent than defamation and allows gay, lesbian, and bisexual individuals to protect themselves. While tort has many purposes, damages tend to assist either deterrence or wholeness. Certainly, financial compensation helps make one whole, but in very few instances (i.e., intentional interference with prospective advantage) can tort come close to succeeding in that goal. Tort should focus on keeping people whole rather than making people whole. That is proper deterrence. A forced outing is essentially nonquantifiable, and thus, economically challenging to compensate. Sexuality-based defamation uniquely hurts gay, lesbian, and bisexual individuals, depriving them of their ability to recover and reinforcing exclusionary mindsets. Additionally, moving to a privacy-based model creates clear lines. If someone has publicly stated their sexuality whether through word or deed, the

³³ 362 Fed. Appx. 273 (3rd Cir. 2010).

press can report on it; if someone has not, this part of their life remains private. This will help keep reporting more issue focused and less personality driven.

Of course, this is far from a panacea, and *Sipple v. Chronicle Publishing Co.*³⁴ shows the limits of recovery under a privacy-based tort regime. After Sipple prevented an assailant from shooting President Gerald Ford, potentially saving his life, publicity followed.³⁵ In this publicity, one columnist noted that Sipple was gay, a fact he had not shared with his family.³⁶ Regrettably, when Sipple's family found out, they abandoned him, causing him emotional pain. The court held that this publication was newsworthy, non-intrusive, and helped counteract negative stereotypes about gay individuals.³⁷ Such is the costs of litigation – sometimes your client loses but a societal movement wins. Yet, anytime an action is deemed defamatory when relating to sexuality, that client wins, but society loses.

From an incentive-based level, the *Sipple* case should be evaluated further for two competing ideas. First, *Sipple* invokes important questions about “community” not mentioned in the discussion of community above. In Sipple's case, one of the communities that seemed to matter most to him was his family, and as a result of the reporting, Sipple painfully lost his connection to his family. Second, *Sipple* shows how migrating sexuality-based torts to intrusion on seclusion is equalizing. Sipple would not have been able to sue for defamation because he was gay, and suing for defamation only serves as an option for straight individuals. Related to the familial point above, if Sipple's family didn't automatically cut him out but instead kept their distance, Sipple most likely would have outed himself by not pursuing a defamation claim. Defamation serves as a forced outing. While the process of sharing one's sexuality is different

³⁴ 20 Cal. Rptr. 665 (Ct. App. 1984).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

for each person, autonomy and freedom stand as two important bedrocks. Sexuality should be shared not forced out.

Two contemporary examples related to privacy and defamation include *New York Times'* expose of former Mayor Ed Koch and Peter Thiel's laser-focused takedown of Gawker.³⁸

First, former Congressman, former mayor, and (maybe most importantly) NYU Law alum, Ed Koch never discussed his sexuality while serving as mayor or after. Dying in 2013, Mayor Koch lived well into a more accepting time but still adamantly chose to keep his sexuality private from the press. Mayor Koch also ran for election when it was still acceptable for people who did not plan on voting for him to make signs saying, "Vote for Cuomo, Not the homo."³⁹ While many people speculate and discuss his sexuality, the *New York Times* treated this topic with deep focus, publishing an expose.⁴⁰ The piece was highly unnecessary and added nothing to the public discourse. Mayor Koch clearly sought to keep this element of his life private, and he was entitled to this.

Running for and serving in public office does not completely foreclose a private life. Of course, this does not mean that a mayor can simply protect all information under the umbrella of privacy, but Mayor Koch did not seek to have sexuality as part of his public life. For example, former Mayor Michael Bloomberg was known for enjoying frequent weekend trips to

³⁸ Nicholas Lemamm. *How Peter Thiel's Gawker Battle Could Open a War Against the Press*. NEW YORKER. May 31, 2016, <https://www.newyorker.com/news/news-desk/how-peter-thiels-gawker-battle-could-open-a-war-against-the-press>.

³⁹ Jen Chung. *Ed Koch Held Decades-Long Grudge Against Cuomos Over "Vote For Cuomo, Not The Homo" Posters*. GOTHAMIST. Feb. 1 2013, <https://gothamist.com/news/ed-koch-held-decades-long-grudge-against-cuomos-over-vote-for-cuomo-not-the-homo-posters>.

⁴⁰ Matt Flegenheimer & Rosa Goldensohn. *The Secrets Ed Koch Carried*. N.Y. TIMES. May 7, 2022, <https://www.nytimes.com/2022/05/07/nyregion/ed-koch-gay-secrets.html>.

Bermuda.⁴¹ This directly impacts the job a mayor can do and the frequency of the trips warranted disclosure.

Second, Peter Thiel made it one of his missions to bankrupt Gawker after Gawker disclosed that Peter Thiel was gay.⁴² Peter Thiel found his opportunity after Gawker published a video of Hulk Hogan having sex by financing the costs of litigation for Hulk Hogan and his lawyers.⁴³ Importantly, Hogan won his case not on a defamation claim but on an invasion of privacy claim.⁴⁴ This does not offer a roadmap forward in regards to litigation strategy, but this example underscores the need for recovery to exist when people are outed and the priority individual's place on privacy.

Courts and common law shape society, and neither the common law nor the courts should reinforce homophobia, which they currently do through allowing sexuality-based defamation. Instead, the common law should protect everyone's privacy, regardless of their sexuality. A regime based on privacy is much more respectful of people's identity, serves as a proper incentive to deter, and responds to a shift in societal acceptance of lesbian, gay, and bisexual individuals.

⁴¹ Michael Barbaro. *New York's Mayor, but Bermuda Shares Custody*. N.Y. TIMES. Apr. 25 2010, <https://www.nytimes.com/2010/04/26/nyregion/26bermuda.html>.

⁴² Wall Street Journal. *Billionaire Who Helped Bankrupt Gawker Explains Why*, YOUTUBE (Nov. 1, 2016), https://www.youtube.com/watch?v=_z4TGEhtdDA.

⁴³ *Id.*

⁴⁴ Nick Madigan & Ravi Somaiya. *Hulk Hogan Awarded \$115 Million in Privacy Suit Against Gawker*. N.Y. TIMES. Mar. 18, 2016, <https://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html>.

Applicant Details

First Name **Donald**
 Last Name **McCullough III**
 Citizenship Status **U. S. Citizen**
 Email Address dm5086@nyu.edu
 Address

Address
Street
63 Whitten St. #1
City
Dorchester
State/Territory
Massachusetts
Zip
02122
Country
United States

Contact Phone Number **7726438665**

Applicant Education

BA/BS From **Cornell University**
 Date of BA/BS **May 2012**
 JD/LLB From **New York University School of Law**
<https://www.law.nyu.edu>
 Date of JD/LLB **May 17, 2023**
 Class Rank **School does not rank**
 Law Review/Journal **Yes**
 Journal(s) **New York University Law Review**
 Moot Court Experience **No**

Bar Admission**Prior Judicial Experience**

Judicial Internships/Externships **No**
 Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Hulsebosch, Daniel
daniel.hulsebosch@nyu.edu
212-998-6132

Sexton, John
john.sexton@nyu.edu
212-992-8040

Gelbach, Jonah
gelbach@berkeley.edu

Vigliotti, Oriana
oriana.vigliotti@nysut.org
718-213-1432

This applicant has certified that all data entered in this profile and any application documents are true and correct.

May 25, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to apply for a clerkship with your chambers during the 2024-2025 term. I am a graduate of New York University School of Law where I was an Executive Editor on the *New York University Law Review*.

My goal for my legal career is to serve the interests of working people, and my hope for a clerkship is to learn how to represent these interests most effectively. This commitment to advocacy is closely held and motivates both my enrollment in law school and this clerkship application. In law school, I deliberately sought opportunities that developed my skills by bridging my ongoing legal education and my substantial prior professional experience as a classroom educator and organizer. My teaching career imparted to me abilities and habits that will serve me well in busy chambers: I perform well under pressure, I know how to balance competing demands on my time, and I am used to filling many roles simultaneously. I will further develop these skills through professional ethics and labor law fellowships following graduation. With these attributes, as well as my legal research and writing abilities, I believe I can make meaningful contributions to the important work of the court.

Please find attached my resume, a writing sample, and my unofficial transcripts. Letters of recommendation will arrive separately from the following individuals:

Professor John Sexton, NYU Law
john.sexton@nyu.edu
212-992-8040

Professor Daniel Hulsebosch, NYU Law
daniel.hulsebosch@nyu.edu
212-998-6132

Professor Jonah Gelbach, NYU Law/Berkeley Law
gelbach@berkeley.edu
202-427-6093

Oriana Vigliotti, Associate Counsel, New York State United Teachers
oriana.vigliotti@nysut.com
718-213-1432

Please let me know if you require any additional information or materials. I am available at 617-506-9203 and by email at donald.mccullough@law.nyu.edu. Thank you very much for your time and consideration.

Donald "Max" McCullough III
Juris Doctor 2023

Donald “Max” McCullough III

63 Whitten St. #1, Dorchester, MA 02122
617-506-9203 | donald.mccullough@law.nyu.edu

EDUCATION**NEW YORK UNIVERSITY SCHOOL OF LAW**, New York, New York

Juris Doctor, May 2023

Unofficial GPA: 3.77/4.0

Honors: *Florence Allen Scholar* – Top 10% of class after four semesters*New York University Law Review*, Executive Editor

Activities: Professor Daniel Hulsebosch, Research Assistant (Summer and Fall 2021, Spring 2022)

Professor Jonah Gelbach, Civil Procedure Teaching Assistant (Fall 2021)

Professor John Sexton, Government and Religion Teaching Assistant (Winter 2023)

Education Advocacy Clinic, Student Advocate

High School Law Institute, Co-Chair and Teacher

Education Law and Policy Society, Treasurer

Publication: Note (forthcoming 2023), *Quick Hearings as a Strike Against Bureaucratic Delay: An Alternative Administrative Procedure for 10(j) Cases Before the NLRB*, *NYU Law Review***SIMMONS COLLEGE**, Boston, Massachusetts

Master of Arts in Teaching, August 2015

Cumulative GPA: 3.95/4.0

CORNELL UNIVERSITY, Ithaca, New York

Bachelor of Arts with Distinction in History, May 2012

Cumulative GPA: 3.89/4.0

Activities: Small Ensemble Registry and Big Red Marching Band, Bassoon and Trombone

Study Abroad: The Smolny Institute, Saint Petersburg, Russia, Spring 2011

EXPERIENCE**MCKANNA BISHOP JOFFE LLP**, Portland, Oregon*Labor Law Fellow*, August 2023-August 2024**PYLE ROME EHRENBERG PC**, Boston, Massachusetts*Legal Intern*, May 2022-August 2022

Participated in all aspects of traditional labor law at the state and federal levels, including collective bargaining, representation disputes, grievance and arbitration, workers' compensation, unfair labor practice charges, and employee discipline and discharge. Drafted briefs in whole or part for arbitration, labor board, and court proceedings. Contributed research and writing to an article on developments at the intersection of agricultural labor law and the cannabis industry.

OFFICE OF GENERAL COUNSEL—NEW YORK STATE UNITED TEACHERS, New York, New York*Legal Intern*, June 2021-August 2021

Conducted legal research in the contexts of collective bargaining, union certification campaigns, misconduct allegations and discipline against members, and direct services to locals and members. Wrote and edited case summaries and legal memos. Worked closely with a mentor attorney in a significant school receivership case, researching, writing, and submitting a brief to the New York Commissioner of Education.

CITY ON A HILL CHARTER PUBLIC SCHOOL, Boston, Massachusetts*History Teacher*, August 2014-June 2020

Created curricula and taught World, US, and Advanced Placement US History. Served as academic and community advisor to four homeroom sections. Advised three extracurricular student groups (Gender and Sexuality Alliance, Anime Club, Comic Books and Graphic Novels Club).

Donald “Max” McCullough III

CITY ON A HILL CHARTER PUBLIC SCHOOL, Boston, Massachusetts

Lead History Teacher, August 2017-June 2020

Oversaw the implementation of network-wide curricula in all history courses. Sat on the advisory Academic Committee to improve course offerings, teacher development, and scheduling. Liaised between school administrators and the history department. Managed the history department budget. Led weekly department meetings and monthly professional development.

Urban Teaching Fellow Mentor, August 2015-June 2016; August 2017-June 2020

Modeled effective teaching and planning while guiding teaching fellows through curriculum design, lesson planning, and state licensure. Conducted daily observations of fellows’ pedagogy and classroom management, produced daily written feedback, and led weekly one-on-one mentoring and planning meetings. Collaborated with the Fellowship Director to support fellows in their first-year teaching.

Urban Teaching Fellow, August 2013-July 2014

Studied under a mentor teacher before assuming sole teaching and curriculum responsibilities for two sections of World History. Provided daily substitute coverage as needed. Advised two extracurricular activities (Gender and Sexuality Alliance and Music Club).

BOSTON TEACHERS UNION, AFT LOCAL 66, Boston, Massachusetts

Bargaining Committee Member, June 2018-June 2020

Bargained collectively on behalf of school staff through the Boston Teachers Union. Conducted research, surveys, and interviews to inform bargaining proposals. Drafted contract proposals through collaboration with legal counsel and union staff. Represented workers at bargaining sessions with management. Won Boston’s first independent charter school union contract in May 2020.

Organizing Committee Member, August 2017-May 2018

Unionized unorganized educators through the Boston Teachers Union. Recruited and trained teachers and staff in union organizing. Executed an adaptable organizing plan, including media strategies, worker mobilizations, and coordinated collection of petition signatures and union authorization cards. Won professional and paraprofessional bargaining unit elections in April 2018.

LEVENTHAL MAP AND EDUCATION CENTER AT THE BOSTON PUBLIC LIBRARY, Boston, Massachusetts

Carolyn A. Lynch Teacher Fellow, May 2017-June 2019

Conducted independent research on the history of early colonial New England. Geo-referenced maps through the Center’s digital collection. Designed original lesson plans and supplemental classroom materials, published online by the Center, focusing on geography, map education, and synthesis of diverse historical documents.

BRANDON SHAFFER FOR COLORADO, Greeley, Colorado

Field Organizer, June 2012-November 2012

Recruited and mobilized more than 100 volunteers in Weld County through phone banks, canvasses, and local community and political events. Conducted voter outreach, education, and get-out-the-vote drives in the campaign to elect the President of the Colorado State Senate to the United States House of Representatives in Colorado’s 4th Congressional District.

ADDITIONAL INFORMATION

Schulte Roth & Zabel Prize for Excellence in Employment Law 2023 recipient. Fellowship at Auschwitz for the Study of Professional Ethics (Law) 2023 recipient. Peggy Browning Summer Labor Law Fellowship 2021 and 2022 recipient. Advanced Placement Teacher Fellows Scholarship 2017 recipient. Adept with computers and a resourceful legal and archival researcher. Deft at finding the silver lining.

Name: Donald McCullough
 Print Date: 02/03/2023
 Student ID: N12949771
 Institution ID: 002785
 Page: 1 of 1

New York University
 Beginning of School of Law Record

Cumulative 45.0 44.0

Fall 2020

School of Law Juris Doctor Major: Law				
Lawyering (Year)	LAW-LW 10687	2.5	CR	
Instructor: Esther Hong				
Criminal Law	LAW-LW 11147	4.0	A-	
Instructor: Rachel E Barkow				
Procedure	LAW-LW 11650	5.0	A-	
Instructor: John Sexton				
Contracts	LAW-LW 11672	4.0	B	
Instructor: Clayton P Gillette				
1L Reading Group	LAW-LW 12339	0.0	CR	
Topic: Class, Gender, Politics, and				
Instructor: Stephen Holmes				
David M Golove				
	AHRS	EHRS		
Current	15.5	15.5		
Cumulative	15.5	15.5		

Spring 2021

School of Law Juris Doctor Major: Law				
Constitutional Law	LAW-LW 10598	4.0	A	
Instructor: Kenji Yoshino				
Lawyering (Year)	LAW-LW 10687	2.5	CR	
Instructor: Esther Hong				
Legislation and the Regulatory State	LAW-LW 10925	4.0	A-	
Instructor: Roderick M Hills				
Torts	LAW-LW 11275	4.0	A-	
Instructor: Barry E Adler				
1L Reading Group	LAW-LW 12339	0.0	CR	
Instructor: Stephen Holmes				
David M Golove				
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR	
	AHRS	EHRS		
Current	14.5	14.5		
Cumulative	30.0	30.0		

Fall 2021

School of Law Juris Doctor Major: Law				
Legal History Colloquium	LAW-LW 11160	2.0	A	
Instructor: David M Golove				
Daniel Hulsebosch				
The Law of Nonprofit Organizations	LAW-LW 11276	3.0	A	
Instructor: Jill S Manny				
Teaching Assistant	LAW-LW 11608	2.0	CR	
Instructor: Jonah B Gelbach				
Labor and Employment Law Seminar	LAW-LW 11681	2.0	A	
Instructor: Samuel Estreicher				
Labor Law: The Reform Agenda	LAW-LW 11863	1.0	***	
Instructor: Samuel Estreicher				
Racial Justice and the Law	LAW-LW 12241	2.0	CR	
Instructor: Bryan A Stevenson				
Jurisprudence	LAW-LW 12359	3.0	B	
Instructor: David Dyzenhaus				
	AHRS	EHRS		
Current	15.0	14.0		

Spring 2022

School of Law Juris Doctor Major: Law				
Complex Litigation	LAW-LW 10058	4.0	A	
Instructor: Samuel Issacharoff				
Arthur R Miller				
Property	LAW-LW 11783	4.0	A+	
Instructor: Frank K Upham				
Education Advocacy Clinic	LAW-LW 12400	3.0	A	
Instructor: Randi Levine				
Matthew Lenaghan				
Education Advocacy Clinic Seminar	LAW-LW 12401	2.0	A	
Instructor: Randi Levine				
Matthew Lenaghan				
Upper-Level Reading Group	LAW-LW 12592	0.0	CR	
Instructor: James Scott Fraser Wilson				
	AHRS	EHRS		
Current	13.0	13.0		
Cumulative	58.0	57.0		
Allen Scholar-top 10% of students in the class after four semesters				

Fall 2022

School of Law Juris Doctor Major: Law				
The Law of Democracy	LAW-LW 10170	4.0	A-	
Instructor: Samuel Issacharoff				
Richard H Pildes				
European Union law at a time of Nationalist	LAW-LW 10851	3.0	A	
Illiberalism				
Instructor: Grainne de Burca				
Professional Responsibility and the Regulation	LAW-LW 11479	2.0	A-	
of Lawyers				
Instructor: Barbara Gillers				
Evidence	LAW-LW 11607	4.0	CR	
Instructor: Erin Murphy				
Federal Courts and the Federal System	LAW-LW 11722	3.0	A	
Instructor: David M Golove				
	AHRS	EHRS		
Current	16.0	16.0		
Cumulative	74.0	73.0		

Spring 2023

School of Law Juris Doctor Major: Law				
Employment Law	LAW-LW 10259	4.0	***	
Instructor: Cynthia L Estlund				
Sexuality, Gender and the Law Seminar	LAW-LW 10529	2.0	***	
Instructor: Darren Rosenblum				
Law Review	LAW-LW 11187	2.0	***	
Labor Law	LAW-LW 11933	3.0	***	
Instructor: Wilma Beth Liebman				
Labor and the Constitution Seminar	LAW-LW 12676	2.0	***	
Instructor: Cynthia L Estlund				
	AHRS	EHRS		
Current	13.0	0.0		
Cumulative	87.0	73.0		
Staff Editor - Law Review 2021-2022				

End of School of Law Record

May 24, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Donald "Max" McCullough, NYU, J.D. 2023

Dear Judge Sanchez:

Max McCullough might be the most genial, low-key potential legal superstar I have ever met. So it is my pleasure to recommend him for a judicial clerkship. I often think about whether, if I were a judge, I'd hire this candidate for my chambers. When it comes to Max, the answer is automatic: Yes. Quickly.

Indeed, I have hired Max before. He served as my Research Assistant last summer, after first year, and he continued to do some work for me over the course of this past academic year. Therefore, I know a lot about his ability to dig, recover, understand, and explain. Among a long list of virtues, one that stands out, for the legal historian seeking research assistance, is *sitzfleisch*. It's increasingly rare. The market—the intellectual market—wants 280 characters or less, now. That sort of ethic has infected even (especially?) the academy. Some young people only know that world; it's hardly their fault. Max is different. He enjoys libraries, books, archives, and all the hard work it takes to make sense of what you might find there. He likes a challenge.

Meeting that challenge requires time and intelligence. Max devoted both his time and his sensitive, analytically sharp mind to various tasks. Most of them had to do with confiscation. It is well known that the American Revolutionaries confiscated Loyalist property during the War for Independence. But what do we know about the legalities and the administration of the confiscation project? Surprisingly little. And what exactly was confiscated? One of the remarkably unknown facts of the confiscation project is that one form of property taken, and immediately auctioned, was enslaved labor. People. This was not the main form of property taken. Land was the key asset—millions of acres. It was not perhaps the most useful form of property confiscated. That might have been guns. And it was not the immediate reason or cause of confiscation. Nonetheless, the condemnation and resale of human bodies was part of the way that the revolutionaries paid for independence. We know something about the British project of emancipating enslaved people held by Patriots who fled and joined the British cause. But what about the enslaved people whom Loyalists left behind? I asked Max to help document and calculate the people whom the Revolutionaries took from loyalists and then resold or redistributed. It's a complex and difficult project, requiring the analysis of many and decentralized archives. But he gave me a large head start. It began with a list of almost 1000 proper names representing people that the state of Virginia confiscated from Loyalists and resold almost immediately. Beyond the human and financial dimensions of this project, there is also the administrative aspect. Classifying Loyalists as such; identifying and surveying their property; adjusting claims for and against those estates; and reselling the remaining corpus—including humans: this was a complicated administrative process for brand new political states and generated surprisingly sophisticated "state" apparatus, just a few years after the Declaration of Independence. Max has been helpful in tracing the construction of this governmental capacity as well.

Max also enrolled in the Legal History Colloquium, which I moderate with a colleague. We invite historians and legal scholars to present works-in-progress. There is a lot of give and take, and some students sit back and allow the professors to dominate. While Max is always respectful, he was always eager to enter the fray—usually to the great benefit of the presenter. As with his research for me, Max was thoughtful and helpful.

I hope it is clear that I think extremely highly of Max. He is genuinely smart: a good reader, a fine writer, and careful and precise when operating on his feet. His law school record after two years is absolutely outstanding. These talents, combined with a first-rate temperament, would make him an outstanding addition to your chambers.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Daniel J. Hulsebosch

Daniel Hulsebosch - daniel.hulsebosch@nyu.edu - 212-998-6132

May 24, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write in support of the candidacy of Donald McCullough for a clerkship in your chambers. I first met Max, as we know him, when he was a student in my Civil Procedure section in Fall Term 2020, which was certainly among the most challenging academic environments in my teaching career. In order to comply with Covid health and safety guidelines while still providing some in-person interaction between students and professors, NYU Law School employed a hybrid teaching method, whereby one-third of the students attended in person while the remaining two-thirds participated remotely. There also were those students who participated fully remotely, and Max was among that group. It was in this difficult learning environment that I came to know Max.

Despite the challenging situation – indeed, by any measure - Max excelled in the class, as he continues to do in all his classes. Prior to law school, Max worked for a Boston charter school, and he brought to the classroom the same preparation and engagement he employed as a teacher. His Teaching Assistants reported the same dedication to and involvement with the class and his classmates. I have a longstanding practice of asking my current roster of Teaching Assistants to recommend to me the TA's for the following semester; when it was time for them to recommend the new slate of TA's for the forthcoming year, Max was among those they recommended. Unfortunately, we did not have the opportunity to work together in Civil Procedure; the Law School was hosting a faculty visitor and I volunteered to step aside so the visitor could teach Civil Procedure. I am delighted to report that Max went on to be a Civil Procedure Teaching Assistant for the faculty visitor. Max and I will be working together in Fall Term 2022, when he will be my Teaching Assistant for an advanced undergraduate seminar I teach on the intersection of government and religion.

His many outstanding accomplishments are listed on his resume: Executive Editor of the New York University Law Review, Treasurer for the Education Law and Policy Society, and a Working Group member of the Political Economy Association, among many others; however, perhaps his most significant commitment in law school has been to the High School Law Institute, which allowed Max to bridge his previous career as a teacher with his legal education. The Institute provides enrichment education to high school students on Saturdays throughout the academic year. Max's responsibilities have included coordinating applications and admissions, running compliance with the university, organizing and disseminating curricula, and recruiting and training the law-student teachers who make the program possible. As Max described it very recently, he does this because he has a deep and abiding passion for education and teaching brings him great joy.

Max clearly has the intellectual heft to successfully meet whatever challenges he faces; however, what is less obvious are the qualities that a person demonstrates simply by who they are rather than by what they have accomplished: Max is affable, engaged, and simply someone with whom it is easy and enjoyable to spend time.

I am confident that Max will be an ideal clerk: he is highly intelligent, works diligently, manages his time and energy wisely, and he is a colleague with whom it is a pleasure to work. For these reasons, I am happy to write in support of his candidacy for a clerkship in your chambers.

Sincerely,
John Sexton

John Sexton - john.sexton@nyu.edu - 212-992-8040



Jonah B. Gelbach
Professor of Law
University of California, Berkeley
School of Law
788 Simon Hall
Berkeley, CA 94720
(202) 427-6093 (cell)
gelbach@berkeley.edu

June 13, 2022

RE: Donald “Max” McCullough, NYU Law ’23

Your Honor:

I write to enthusiastically recommend **Donald “Max” McCullough** for a judicial clerkship in your chambers.

I know Max (the name by which I know him) because he was my teaching assistant for the 1L civil procedure course I taught in the Fall 2021 semester at NYU Law, where I was a Visiting Professor. Max was selected for this position, along with a handful of classmates, by his own 1L civil procedure professor, John Sexton, following Max’s highly successful Fall 2020 performance. I inherited Professor Sexton’s teaching assistants when he graciously stepped aside so that I could teach Procedure while visiting NYU.

Max was simply terrific as a teaching assistant. He was highly organized, which is tremendously important for a 1L doctrinal course with 99 students. I had a somewhat idiosyncratic system for teaching the course that semester, with TAs expected to carry out lots of different activities throughout each week, with a premium on meeting deadlines. Some days they attended class, some days they drafted questions for students consider before class, and some days they drafted questions for students to consider after class meetings. TAs also did regular office hours with students and occasional review sessions, and they regularly interacted with me informally about varying course topics.

Max excelled at all of this, regularly exceeding my expectations. He was always available to help me, and it seemed like a daily event that I would see him in the NYU Law courtyard answering students’ questions either in person or via Zoom office hours.

One memorable interaction involved the personal jurisdiction classic, *Shaffer v. Heitner*. As one does, I’d gone over class time in discussing other cases in the canon, and I really needed to move on. At the same time, I felt the students should get something more about *Shaffer* than just “read the casebook”. So with Max’s assistance, I wrote up a Socratic dialogue about the



Donald "Max" McCullough, NYU Law '23
June 13, 2022
Page 2

case, and Max and I recorded a video of it, with Max playing the student's part. We did this remotely, at night, and he did a fantastic job. Many students commented to me about this.

I know that I've written a lot about the course so far, so I want to plant a flag here to emphasize my high regard for Max's legal skills and knowledge. He is highly knowledgeable and just has insightful about procedural law. Although he was never my student in a course, we had numerous discussions about the law, and I am certain those qualities will make him a really outstanding clerk. I am also sure he'll be organized, on point, and easy to work with. He was all of those things in every way as my TA.

I have had the benefit of having many informal interactions with Max not only in the Fall semester when he worked with me, but also in the following Spring semester, as I saw him around the law school frequently. Max is a lovely, thoughtful, and highly personable human being. I would hire him again in a heartbeat, and I am sure that anyone who hires him now will feel the same way.

Worth noting is that Max comes from an unusual background for a high-achieving member of a top law school's class. His family is filled with working class folks rather than scholars or attorneys, and it's very clear this background has shaped Max throughout his life and budding career. He spent eight years in the workforce between college and law school, with most of that time as a high school history teacher. Max is deeply invested in education law and labor law, and in the ways the law affects the interests of working class people. I am sure that after clerking, he'll work in areas related to those interests.

In sum, I am confident Max will make an excellent clerk at either the trial or appellate court level (he is interested in both). I recommend him unreservedly. The judge who hires Max will be well rewarded.

Yours,

/s/ Jonah Gelbach

Jonah B. Gelbach
Professor of Law at Berkeley Law
Visiting Professor of Law at NYU Law (2021-2022 Academic Year)



Office of General Counsel

ROBERT T. REILLY
General Counsel

Albany

Buffalo

New York

Jennifer N. Coffey
Associate General Counsel

Lena M. Ackerman
Assistant General Counsel

Michael S. Travinski
Associate General Counsel

Jennifer A. Hogan
Associate General Counsel

March 28, 2022

Re: Letter of Recommendation for Donald (Max) McCullough

Your Honor:

My name is Oriana Vigliotti, Esq., and I am Senior Counsel with the New York State United Teachers, Office of General Counsel (NYSUT OGC), located in New York City. It is with great pleasure that I submit this letter of recommendation for Donald (Max) McCullough for a judicial clerkship. Max worked at NYSUT OGC as a law clerk during the Summer of 2021 through a competitive fellowship sponsored by the Peggy Browning Fund. I had the pleasure of working with, and directly supervising, Max and was consistently impressed with his high-quality work product and strong work ethic. Max is by far the best law clerk I have encountered in my 20 years of practice.

NYSUT is a statewide labor organization serving the needs of its more than 600,000 members. NYSUT OGC is the organization's in-house legal department which provides representation and guidance in a variety of settings in both the public and private sectors. During the summer of 2022, the school district of one of our local unions was placed in receivership by the State Education Department Commissioner of Education (Commissioner). The receivership designation forced renegotiation of the local's collective bargaining agreement (CBA) on an extremely truncated timeline and allowed the Commissioner to abrogate certain portions of the collective bargaining agreement in the event the parties did not come to a negotiated agreement within days of the designation. Max and I represented the NYSUT local throughout the receivership negotiations and ensuing litigation before the Commissioner and I can say without hesitation that I could not have done it without Max. Max jumped in immediately and was a valued member of the bargaining team. He was confident enough to ask thoughtful questions of the team and offer answers where appropriate. Max's research and analytical skills are top-notch, and he takes the time to understand the issues and provide research that answers the questions presented with thoughtful analysis. Max researched and drafted portions of the briefs we submitted to the Commissioner and after my review, I was able to simply cut and paste Max's legal research and arguments into the final briefs.

Max's writing skills as a rising 2L were superior to those of many lawyers with whom I have worked over the years. He is able to synthesize arguments concisely and persuasively and he organizes his writing in a thoughtful manner. When writing the facts section of a memorandum or brief Max presents the facts in an easy to understand and thorough, yet concise, manner.

800 Troy-Schenectady Road, Latham, NY 12110-2455 ■ (518) 213-6000

New York State United Teachers
Affiliated with • AFT • NEA • AFL-CIO

Max was always timely with his assignments, and he remained in constant communication with me about what was expected and how he could meet my expectations. On Max's first day in our office, I was finalizing a reply brief and I needed immediate research assistance on a specific point of law. Max jumped in without hesitation and provided me with legal citations with concisely drafted parentheticals to support the specific points of law I provided to him. It was a high-pressure assignment and Max handled it calmly and professionally on his first day in our office. After that initial interaction, I knew I could trust Max with important and time-sensitive litigation assignments.

Max was consistently enthusiastic and conscientious with his assignments. During his time with NYSUT, Max stood out because of his excellent research and writing skills, professional demeanor, and pleasant disposition. Further, and perhaps most importantly, Max is a pleasure to work with. He is a genuinely pleasant person and I always looked forward to chatting with him about law school, politics, and his future plans. Max was universally well-liked at NYSUT OGC and, as a result, his assistance on research and writing projects was always in high demand.

I am confident Max will be an excellent judicial clerk. In fact, after working closely with Max all summer and coming to the realization that he was an extraordinary law student and law clerk, I suggested to him that he apply for clerkships. Max will be a wonderful addition to your courtroom. Please feel free to call or email me should you have additional questions, as I would welcome the opportunity to provide more in-depth feedback on Max and his exemplary work in NYSUT OGC.

Sincerely,

Oriana Vigliotti

ORIANA VIGLIOTTI
Senior Counsel

Donald “Max” McCullough III
63 Whitten St. #1, Dorchester, MA 02122
617-506-9203 | donald.mccullough@law.nyu.edu

Please find below a sample of my written work product. This sample is a brief I drafted for a partner attorney at Pyle Rome Ehrenberg PC during my 2022 Peggy Browning Fellowship. I was charged with researching and writing the brief after attending a virtual arbitration hearing between the union local and the hotel employer. The draft represents my own work and has been edited by me for length and anonymity. It is shared with the permission of Pyle Rome’s managing partner, Al Gordon O’Connell.

Thank you for your time and consideration.

Respectfully,

Max McCullough
Candidate for Juris Doctor 2023

The Hotel also raised arbitrability as a defense. This late-raised issue was again unsupported by any evidence other than the date of the grievance. The Union representative who filed the grievance, ____, testified without contradiction that she waited to file the grievance because General Manager ____ repeatedly assured her that he was working with the Chef to restore breakfast. While the Union agreed to certain contract waivers during the declared public health emergency stemming from the pandemic—including permitting the Hotel to offer a meal stipend along with grab-and-go options or no meals at all—the Hotel failed to provide breakfast to its workers well past the expiration of these waivers and after Shop Steward ____ provided General Manager ____ an opportunity to restore this benefit. Accordingly, every day that passes without food and beverages in the morning, the Hotel has violated Article 10 of the CBA, which ensures that “previous practices with respect to provision of meals or other food or drink at meal time or break time shall be continued.” [UX 1, p. 17.]¹

For these reasons, as further explained below, the Union respectfully requests that the Arbitrator find that the Hotel had a past practice of providing breakfast to its workers and that it has violated the CBA by failing to provide it since reopening in August 2021.

II. ISSUE

The parties could not stipulate to an issue at the hearing. The Union proposes that the issue should be:

Did the Hotel violate the parties’ collective bargaining agreement by failing to provide breakfast consistent with prior practice? If so, what shall be the remedy?

III. RELEVANT PROVISIONS OF THE PARTIES’ CBA

¹ As used herein, UX shall refer to Union Exhibits and EX shall refer to Employer Exhibits.

Article 10 Meals

Meals All regular employees shall be entitled to one meal without charge for each shift worked, which shall be consumed on the premises for the convenience of the Employer. The value of such meals shall not be computed as income for tax purposes, so long as such exclusion is permitted by law.

If any employee works a split shift, i.e. eight hours within ten hours, then said employee is entitled to two meals.

Any other previous practices with respect to provision of meals or other food or drink at meal time or break time shall be continued. [UX 1, pp. 17–18.]

Article 19 Grievance Procedure

Any differences, disputes or grievances relating to the interpretation of this Agreement which arise during the term of the Agreement shall be disposed of as provided by this grievance and arbitration procedure.

No grievance shall be considered under the grievance procedure unless it specifies the nature of the grievance in writing to the Employer within thirteen (13) days after the circumstances giving rise to when the grievance first occurred or within thirteen (13) days after the date when the grievant reasonably should have known the grievance exists. [UX 1, pp. 23–24.]

IV. FACTS

a. Before the Strike and the Pandemic, the Hotel Consistently Provided Breakfast Options in the Staff Cafeteria for Its Employees Who Work in the Morning

Multiple Hotel employees testified that breakfast was consistently available to them before 2019. While each person’s memory of the specific items differed to some degree, the core breakfast options were consistent: bagels and breads with various spreads like cream cheese, peanut butter, and jelly; two thermoses of regular and decaf coffee, along with sugar, creamer, and hot water for tea; and cereal with milk. These items were set out in the staff cafeteria and were available throughout the morning. Room Attendant and Union Shop Steward ____ further testified that the breakfast was set up as a self-serve buffet, with temperature-sensitive items on

ice, cups and utensils available nearby, and coffee thermoses set up next to the cafeteria's soda machine.

These food items were available to employees all morning. Banquet Server ____ testified that the cafeteria was open early and breakfast was available even when he arrived to work at 5:30AM. Room Attendant ____ testified to similar effect, stating that when she would arrive to the cafeteria at 7AM before her 8AM shift, she found the usual breakfast options. These items would be available until the cafeteria was prepared for employees' lunch in the late morning.

Various employees were responsible for preparing breakfast. Room Attendant ____ noted that when she had previously worked in In-Room Dining and had arrived at 5:30AM for her shifts, she would sometimes make the coffee for staff breakfast. She also recalled that if someone else made the coffee before her, they would write down the time the coffee was brewed on the coffee thermos for reference. Room Attendant ____'s testimony also reflects this shared responsibility, as she recalls the Chef, the Kitchen Steward, and various In-Room Dining employees brewing coffee and putting out the breakfast items.

b. After the Strike and the Onset of the COVID-19 Pandemic, the Hotel Has Not Provided Any Breakfast to Employees

Hotel employees went on strike in the fall of 2019 for 79 days, concluding the strike in November. [UX 2.] Employees returned to work for only a few weeks before the COVID-19 pandemic caused further disruptions. Occupancy rates fell through January and February 2020 and the governor declaring a state of emergency in March 2020, leading to a temporary closure of the Hotel. To address the public health concerns the pandemic created and reduce the risk of transmission as the Hotel more fully reopened for business, the Hotel and the Union signed a Memorandum of Understanding in September 2020. [EX 1.] To facilitate a gradual reopening

and account for the requirements of the Governor's State of Emergency, this MOU included several contract waivers, including one permitting the Hotel to offer \$10 meal credits in lieu of actual meals. [*Id.*] These waivers were temporary and, after the parties agreed to extend them, expired at the end of the declared State of Emergency in July 2021. [*Id.*]

The Hotel reopened slowly in response to the changing conditions of the pandemic and the Union and Hotel endeavored to work together to restore service. The parties reached an agreement in June 2021 to eliminate the \$10 stipends in lieu of meals and resume actual meal service in the reopened staff cafeteria, first five days a week and later seven days a week as the Hotel's restaurant resumed operations. [EX 2.] Lunch and dinner were provided during the hours of 11AM–2PM and 4PM–6PM, respectively. [*Id.*]. The Hotel complied with this agreement.

This agreement did not address the morning. The Hotel never resumed providing food and drink for breakfast. Room Attendant ____, Room Attendant ____, and Banquet Server ____ were absolutely unified in their testimony on this point: No breakfast has been provided whatsoever since staff meals recommenced, and the staff cafeteria is now open, but completely empty, in the morning.

c. The Hotel Responded to Union Inquiries about the Provision of Breakfast with Evasion and Delay

During the partial and staggered reopening of the Hotel, Room Attendant ____, acting in her capacity as Union Shop Steward, approached Hotel General Manager ____ several times to discuss the failure of the Hotel to resume its breakfast for employees. These conversations took place between June and November 2021 and culminated in the instant grievance after months of evasion and obfuscation by the Hotel.

___ testified without contradiction that the first few times she asked, ___ told her that he would speak to the Chef about restoring breakfast. He stated this was because parts of the Hotel's food service operations were still closed or in the process of reopening. ___ credited ___'s assurances that he would speak to the kitchen and resolve the issue. But as ___ continued to inquire over days and weeks into the Hotel's persistent failure to provide breakfast, ___'s position shifted. ___ then claimed not to remember that breakfast had ever been provided. Following this final conversation, and the realization that the Hotel had neither made plans as part of its reopening to provide breakfast nor intended to resume its prior practice, ___ filed this grievance on November 18, 2021. [UX 3.]

V. DISCUSSION

a. This Grievance Is Timely and Arbitrable

The Hotel's claims that the Union was untimely in filing this grievance are both procedurally improper and without substantive merit. Accordingly, the Arbitrator must find that the grievance was timely filed and decide this case on its merits.

1. The Hotel Waived Its Right to Raise a Timeliness Objection by Failing to Raise It in the Grievance Proceedings

Issues of timeliness must be raised early in the grievance process, or such objections will be deemed waived. *See, e.g., Crestline Exempted Village Schools*, 111 LA 114, 116 (Goldberg, Arb. 1998) ("It is a well understood arbitration principle that timeliness issues must be raised early in the grievance process The purpose for the rule is to favor the hearing of grievances on their merits"); *Liquid Transporters*, 99 LA 217 (Witney, Arb. 1992) (noting that arbitration is not the place to raise timeliness issue for first time and proceeding to hear the grievance on the merits), *cited in* Elkouri & Elkouri, *How Arbitration Works* at 5.7.A.iii, n. 177

(8th ed., May ed. 2016). A party waives its right to object to a grievance’s arbitrability if it “does not timely object to the arbitrability of the grievance, but instead waits until the hearing or shortly before the hearing to object.” Elkouri & Elkouri at 5.3.B.

Here, the Hotel did not raise any timeliness or other procedural objection to the grievance before arbitration. The Hotel’s own written account of the Step 1 grievance procedure reads:

The Hotel and Union met via zoom on 12/1 to discuss grievance # _____. The Hotel’s position is that we are honoring the CBA, article #11, by “...providing one meal without charge for each shift worked...” The Hotel asked the Union for evidence that a morning meal was provided. The Hotel also asked the Union specifically what was provided in the morning and the Union provided the following list; Coffee, cream cheese, jam, peanut butter, milk, toast, bagels whatever bread was available, tea and sugar. The Hotel is waiting for evidence from the Union that morning food and beverage was provided. (Evidence other than the memories of employee)

Again, the hotel feels it is honoring the CBA, article #11 by providing one meal for each shift worked. [UX 4].

The Hotel made no attempt to raise a procedural timeliness argument. Instead, the Hotel made substantive claims regarding the contract and the merits of the grievance and asked for additional evidence. By this posture, the Hotel has waived its right to raise timeliness objections to the Arbitrator.

2. The Hotel’s Failure to Provide Breakfast to Its Employees Is a Continuing Violation That Tolls the CBA’s Time Limit for Filing a Grievance

The Hotel’s claims of untimeliness also fail substantively. The argument that the CBA required the grievance be filed within thirteen days ignores that each morning employees are denied breakfast is a new violation of the contract. The Hotel’s failure to provide breakfast amounts to a continuing violation. A repeated, continued violation of the contract deserves particular attention and is less amenable to a contractual time limitation than standalone

transgressions. *See Consolidation Coal Co.*, 112 LA 407, 408 (West, Arb. 1999) (finding that “as a practical matter, some deference should be given to an ongoing, as opposed to an isolated, incident” and refusing to impute knowledge to the Union or enforce a ten-day contractual time limit), *cited in* Elkouri at 5.7.A.ii., n.161; *AFSCME Local 3135*, 2001 LA Supp. 114898 (Reeves, Arb. 2001) (holding that, under a contract with a 10-day limitation from when the grievant “should have reasonably known” about a violation, “in the event of a continuing violation, the 10-day period starts anew every day”). A continuing violation gives rises to a continuing grievance, which can be filed “at any time, up to the end of such [continuing violation.]” *William Scheele & Sons Co.*, 68 LA 574, 578 (Mikulina, Arb. 1977) (rejecting the company’s untimeliness argument before denying the grievance on the merits).

The continuing violation doctrine is especially applicable to the instant case, considering the Union’s efforts to work with the Hotel on reopening and the uncertainties of the pandemic itself. Further, the Union acknowledges that it may no longer seek a remedy for individual violations that occurred more than thirteen days prior to the grievance. But whether the Hotel violated the CBA in July or November 2021, both are identical violations with the same simple remedy: The Hotel must provide breakfast to its employees as it did each day before the strike and the pandemic.

3. The Hotel’s Dishonest Tactics of Evasion and Delay Impeded the Filing of the Grievance

Finally, the Hotel’s evasive conduct weighs against a finding that the grievance is untimely. “Forfeiture of a grievance based on missed time limits should be avoided whenever possible.” *Safeway Stores*, 95 LA 668, 673 (Goodman, Arb. 1990) This is an offshoot of the “general presumption . . . that favors arbitration over dismissal of grievances on technical

grounds.” Elkouri & Elkouri at 5.3.B (citing cases). Such a presumption should hold especially true when the grievant’s alleged technical violation of the contractual time limit is owed to management foot-dragging. *Cf. Consolidation Coal Co.*, 112 LA 407, 407–08 (West, Arb. 1999) (refusing to speculate about the grievant’s actual knowledge when his inquiries “received no answer”).

Shop Steward ____ made good faith inquiries into the status of reopening the staff cafeteria for breakfast. These inquiries provided the Hotel an opportunity to correct the continuing violation, an opportunity that it ignored. Rather than providing a straight answer, General Manager ____ repeatedly prevaricated, promising to ask around but providing no clarity. In the fog of reopening in the pandemic, awareness of the violation coalesced over several conversations between the parties. The Union should not be prejudiced for its forbearance in waiting to file this grievance until it became clear that the Hotel had no intention of honoring its prior practice.

For all these reasons, the Arbitrator must find that the grievance was timely filed, reject the Hotel’s objection, and decide this case on the merits.

b. The Hotel Violated Article 10 of the CBA When It Ceased Providing Breakfast in the Staff Cafeteria

This case is straightforward. The Union has shown that the Hotel had a prior practice of consistently providing certain breakfast items to its employees. The Hotel has adduced no evidence to contradict the testimony of Room Attendants ____ and ____ and Banquet Server _____. Article 10 of the CBA between the parties explicitly protects such prior practices from unilateral discontinuance. Recent arbitration decisions in Boston interpreting substantively identical contract language support a finding by the Arbitrator that the Hotel violated Article 10 when it failed to provide breakfast to its employees.

1. Article 10 Explicitly Protects Past Meal Practices Beyond the Provision of One Meal Per Shift Worked

The Hotel does not have the authority to unilaterally change its meal practice. Article 10 of the parties CBA guarantees two things: 1) one meal per shift worked and 2) “[a]ny other previous practices with respect to provision of meals or other food or drink at meal time or break time shall be continued.” [UX 1, pp. 17–18.] This guarantee of continued past practices is a bargained-for element of the contract, distinct from the one-meal-per-shift requirement, that will be rendered meaningless if the Hotel can cease to provide the established breakfast options.

While the contract does not explicitly state that breakfast will be provided, it does explicitly protect established meal practices. Arbitrators have found complimentary meal and coffee practices binding because their provision goes beyond the basic functions that inhere to management and provides a special benefit to employees. *See Greater L.A. Zoo Ass'n*, 60 LA 838, 842 (Christopher, Arb. 1973) (determining the employer violated its CBA when it changed a past practice and began requiring employees to purchase their own meals); *Farmland Industries*, 72 LA 1302, 1307 (Heneman, Arb. 1979) (finding that the provision of a certain kind of pizza as a meal option constituted a binding past practice); *see also* Elkouri & Elkouri at 12.5.C. (noting that a past practice of “free coffee or free meals” is a benefit that cannot be unilaterally terminated by management). Contract clauses that protect particular *kinds* of past practice operate to limit the rights of management to make unilateral changes. *See City of Greenfield*, 77 LA 8, 10–11 (Yaffe, Arb. 1981) (rejecting management’s attempts to change its meal practices “where the parties have negotiated a maintenance of standards clause protecting all favorable working conditions which have been established by past practice”).

Here, the Union has demonstrated through the testimony of multiple employees, uncontradicted by any evidence in the record, that the core breakfast options offered in the past constituted a clear and binding past practice. The availability of light fare for workers to enjoy on their breaks throughout the morning confers a material benefit to employees, eliminating the need to procure their own breakfast. The combination of the clear and long-standing practice of providing breakfast and the bargained-for maintenance of meal standards clause limits the Hotel's prerogatives and prevents it from discontinuing the breakfast practice.

2. Recent Arbitration Decisions Support This Interpretation and Application of Article 10 to Circumstances Like This One

As a result of what appears to be Boston area hotels' collective effort to diminish or eliminate employee meals in Boston area hotels, this is the fourth employee cafeteria case to proceed to arbitration in the past year. Two of these cases have produced arbitration awards which arrived at different results, but the reasoning of both supports the Union's position in this matter.

....

VI. CONCLUSION

For the above reasons, the Arbitrator must find that the Hotel has violated the CBA by abandoning its past practice of providing breakfast to its employees. The Union respectfully requests that the Arbitrator sustain its grievance and render the appropriate remedy, which in this case is to direct the Hotel to resume offering the same consistent, core breakfast offerings—bagels, assorted breads, cereal, milk, coffee, tea, sugar, creamer, peanut butter, jelly, and cream cheese—that were available all morning before the strike and the pandemic.

Further, for the duration of the continuing violation, the Union respectfully requests that the Hotel pay each employee \$10 per day for every shift worked since November 5, 2021, which is thirteen days prior to the filing of the grievance. [See UX 1, p. 23; UX 3.] This reflects the approximate value of coffee and a bagel at any local Boston establishment, and is supported by the parties' mutual agreement, codified twice, of the \$10 value of failure to comply with Article 10. [See CX 1 & CX 2.]

Applicant Details

First Name	Natalia
Middle Initial	A
Last Name	McLaren
Citizenship Status	U. S. Citizen
Email Address	nmclaren@uchicago.edu
Address	<div><div>Address</div><div>Street</div><div>5100 S Cornell Ave, Unit 505,</div><div>City</div><div>Chicago</div><div>State/Territory</div><div>Illinois</div><div>Zip</div><div>60615</div><div>Country</div><div>United States</div></div>
Contact Phone Number	5702420314

Applicant Education

BA/BS From	Dartmouth College
Date of BA/BS	June 2020
JD/LLB From	The University of Chicago Law School
	https://www.law.uchicago.edu/
Date of JD/LLB	June 1, 2024
Class Rank	School does not rank
Law Review/Journal	Yes
Journal(s)	Chicago Journal of International Law
Moot Court Experience	No

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	No
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

Peterson, Farah
fpeterson@uchicago.edu
773-702-9494
Konsky, Sarah
konsky@uchicago.edu
773-834-3190

This applicant has certified that all data entered in this profile and any application documents are true and correct.

5100 S Cornell Ave, Unit 505
Chicago, IL 60615
(570) 242-0314
nmclaren@uchicago.edu

June 12, 2023

The Honorable Juan R. Sanchez
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am a rising third-year law and business student at the University of Chicago Law School and the Booth School of Business, and I am applying for a clerkship in your chambers for the 2024 term. I wholeheartedly believe I would have the most engaging, challenging, and rewarding experience clerking for you. As I grew up in the Poconos, Pennsylvania and still have immediate family in the area, working in a district court that directly affects the Poconos greatly appeals to me.

As a practicing attorney, I hope to work with either a Supreme Court & Appellate (“SCA”) practice group or a White-Collar Crime (“WCC”) practice group. Choosing to do white-collar work would allow me to work in an international or U.S. office long term, whereas SCA practice opportunities only exist in the United States. Since I am still unsure of which practice I will choose, I am interested in either or both district court and appellate court clerkships because an appellate clerkship provides an edge in SCA practices whereas district court experience is more relevant for WCC work. Further, I have longer-term dreams of becoming a federal judge one day. Clerking in your chambers would not only greatly improve my research and writing skills and provide perspective on the other side of litigation, but also would provide insight into whether I would like to pursue a judgeship in the future. For me, making the choice to pursue a judgeship is imperative because it will help me choose not only the practice area in which I will work, but also the continent in which I will live.

I would welcome the opportunity to apply my strong research, writing, and analytical skills as well as my practical experience in litigation to chambers. As a member of the *Chicago Journal of International Law*, I analyzed different international laws to determine which, if any, would provide recourse for disparate treatment between forced migrants in Europe for my Comment. At Skadden, Arps, Slate, Meagher and Flom LLP, I researched the intersection between federal preemption and state labor laws for transportation services that span multiple states in the U.S. and drafted a case summary to be distributed to the client. In addition, I conducted research and wrote a brief regarding the continuously changing standards of Article III standing during my first-year legal research and writing course. My final brief in *U.S. Supreme Court: Theory and Practice* argued against granting certiorari for a telecommunications case regarding vicarious liability and common law agency. Prior to law school, I gained extensive experience researching on Westlaw and Pacer for information later included in briefs, memoranda, and other materials while working as a paralegal at Shipman & Goodwin LLP.

A resume, transcript, and writing sample are enclosed. Letters of recommendation from Professors Peterson and Konsky will arrive under separate cover. Should you require any additional information, please do not hesitate to reach out. Thank you for your time and consideration.

Warmly,



Natalia McLaren

NATALIA McLAREN

5100 South Cornell Avenue, Unit 505, Chicago, Illinois 60615 • (570) 242-0314 • nmclaren@uchicago.edu

EDUCATION

The University of Chicago Law School and The Booth School of Business, Chicago, Illinois **June 2024**

Juris Doctor and Master of Business Administration expected

Journal: *Chicago Journal of International Law* (Comments Editor)

Activities: Supreme Court & Appellate Society (President, Co-Founder), Student Government (Student Voices Chair), Dean of Students Advisory Council, Fashion & Beauty Law Society (President), Booth Volleyball (Co-Chair), Black Law Students Association, International Law Society, Law School Musical

Dartmouth College, Hanover, New Hampshire

June 2020

Bachelor of Arts, magna cum laude, Double Major: Government & English, Creative Writing and Psychology

Honors and Awards: Phi Beta Kappa, High Honors in English, W.E.B. Du Bois Award for Academic Excellence,

Senior Law Prize, Jack Baird Prize, Presidential Scholar, Emerging Leader, Excellence in Management and Leadership

Activities: Mock Trial Society, Law Journal (Senior Editor), Women's Club Volleyball (Coach, Captain), Gospel Choir (Soloist), Committee on Standards (Judge), Department of Psychology (Research Assistant, Tutor)

Spanish Language Study Program: University of Barcelona, Barcelona, Spain

March 2018

Government Foreign Study Program: London School of Economics and Political Science, London, England

September 2017

EXPERIENCE

Skadden, Arps, Slate, Meagher & Flom LLP, Washington, District of Columbia; London, England **May 2022-August 2023**

1L and 2L Summer Associate, 1L Scholar

(Seasonal)

- Conducted research regarding federal preemption and state labor laws for the Supreme Court and Appellate Practice
- Drafted an Interview Memo from a witness interview regarding compliance with anti-corruption and anti-bribery laws
- Researched manufacturer direct motor vehicle sales to consumers for an in-house client rotation at Capital One

Shipman and Goodwin, LLP, Washington, District of Columbia

August 2020-July 2021

Insurance Litigation Paralegal

- Cite-checked and assisted attorneys in filing state, federal, and appellate pleadings
- Drafted and revised documents including motions, declarations, affidavits, and correspondence
- Conducted legal research and factual investigation through Westlaw and Pacer

United States Embassy in London, London, England

July 2019-September 2019

Political Intern

- Assisted in the coverage of bilateral and multilateral political and security issues such as global terrorism, the proliferation of Weapons of Mass Destruction, and the U.S./UK role in Middle East crises
- Researched specific UK domestic and international political issues
- Created briefing memos and talking points for the Ambassador's trip to a strategically important British Overseas Territory

United States Senate, Washington, District of Columbia

January 2019-March 2019

A. Leon Higginbotham Jr. Intern for Senator Robert P. Casey

- Drafted a Decision Memo for a bill regarding Veterans' Affairs
- Created Military Information Memos regarding the U.S. Strategic Command, Northern Command, and Central Command

Pennsylvania Department of Education, Harrisburg, Pennsylvania

July 2017-August 2017

Intern

- Created a summary and analysis of policy revisions suggested by the United States Department of Education
- Analyzed and summarized policy recommendations regarding mental health impacts on university students in Pennsylvania

Pennsylvania's State Representative 189th District Office, East Stroudsburg, Pennsylvania

June 2017-August 2017

Intern for State Representative Rosemary Brown

- Participated in constituent outreach methods through phone calls and letters
- Assisted employees in problem-solving issues with constituents

Powlette and Field, LLC: Attorneys at Law, Stroudsburg, Pennsylvania

June 2016-August 2017

Legal Intern

(Seasonal)

- Prepared and edited deeds, wills, power of attorneys, real estate closing documents, and other legal documentation
- Served as an intermediary between clients, real estate agents, the title agency, and lenders in over 30 real estate transactions

SKILLS

Legal: Bluebook citation format, Westlaw, Pacer, CM/ECF, DISCO databases, Concordance databases

Languages: Intermediate Spanish





Name: Natalia Angelina McLaren
Student ID: 12334928

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
Three-Year J.D./M.B.A.

External Education

Dartmouth College
Hanover, New Hampshire
Bachelor of Arts 2020

Dartmouth College
Hanover, New Hampshire
Bachelor of Arts Hons 2020

Beginning of Law School Record

		Autumn 2021		
Course	Description	Attempted	Earned	Grade
LAWS 30101	Elements of the Law Richard McAdams	3	3	179
LAWS 30211	Civil Procedure William Hubbard	4	4	178
LAWS 30611	Torts Adam Chilton	4	4	177
LAWS 30711	Legal Research and Writing Hannah Shaffer	1	1	180
		Winter 2022		
Course	Description	Attempted	Earned	Grade
LAWS 30311	Criminal Law Sonja Starr	4	4	177
LAWS 30411	Property Lee Fennell	4	4	179
LAWS 30511	Contracts Eric Posner	4	4	176
LAWS 30711	Legal Research and Writing Hannah Shaffer	1	1	180

Spring 2022

Course	Description	Attempted	Earned	Grade
LAWS 30712	Legal Research, Writing, and Advocacy Hannah Shaffer	2	2	177
LAWS 30713	Transactional Lawyering David A Weisbach	3	3	177
LAWS 40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	177
LAWS 44201	Legislation and Statutory Interpretation Farah Peterson	3	3	180
LAWS 57507	Managerial Psychology Ayelet Fishbach	3	3	180

Summer 2022

Course	Description	Attempted	Earned	Grade
BUSN 30000	Financial Accounting J Douglas Hanna	3	3	B-
BUSN 41000	Business Statistics Robert E Mcculloch	3	3	B

Honors/Awards

The Chicago Journal of International Law, Staff Member 2022-23

Autumn 2022

Course	Description	Attempted	Earned	Grade
BUSN 31001	Leadership: Effectiveness and Development Robert Ward Vishny	0	0	P
BUSN 33001	Microeconomics Andrew McClellan	3	3	C+
BUSN 37000	Marketing Strategy Berkeley Dietvorst	3	3	A
BUSN 38003	Power and Influence in Organizations A. David Nussbaum	3	3	A-
LAWS 50311	U.S. Supreme Court: Theory and Practice Meets Writing Project Requirement Designation: Sarah Konsky Michael Scodro	3	3	179
LAWS 94130	The Chicago Journal of International Law Anthony Casey	1	1	P

Winter 2023

Course	Description	Attempted	Earned	Grade
BUSN 33112	Business in Historical Perspective Richard Hornbeck	3	3	A-
BUSN 38119	Designing a Good Life Nicholas Epley	3	3	A
LAWS 43280	Competitive Strategy Eric Budish	3	3	178
LAWS 81002	Strategies and Processes of Negotiation George Wu	3	3	179
LAWS 94130	The Chicago Journal of International Law Anthony Casey	1	1	P



Name: Natalia Angelina McLaren
Student ID: 12334928

University of Chicago Law School

		Spring 2023			
Course	Description	Attempted	Earned	Grade	
BUSN 31403	Leadership Studio Harry L Davis Nancy Tennant	3	3	A	
BUSN 38002	Managerial Decision Making Anuj Shah	3	3	A	
LAWS 42603	Corporate and Entrepreneurial Finance Steven Neil Kaplan	3	3	177	
LAWS 43248	Accounting and Financial Analysis Philip Berger	3	3	174	
LAWS 94130	The Chicago Journal of International Law Req Meets Substantial Research Paper Requirement	1	1	P	
Designation:		Anthony Casey			

End of University of Chicago Law School

Professor Farah Peterson
Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
fpeterson@uchicago.edu / 203-464-4967

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I'm writing to express my support for Natalia McLaren's application to clerk in your chambers. Natalia was my student in the required 1L Legislation and Statutory Interpretation course. There, she was always ready to speak up when I asked for volunteers and she proved consistently on top of difficult questions of doctrine. She was also prepared to discuss broader points about constitutional design and the tradeoffs between different judicial and democratic values in our class debates over methods of interpretation. Her final exam earned an A because it was lawyerly, imaginative, and well written.

Natalia is the type of person who creates community and builds institutions wherever she goes. While at the law school, she founded the Supreme Court and Appellate Society, a group that is already hosting meetings and inviting speakers, and is part of the life of the school. She is also one of the most charming people I've ever met. Natalia resists categorization as an affiliate of any clique or indeed, of any party, as an essential part of her personality is her ability to talk to and befriend anyone, anywhere. Budding good lawyers are easy to find at the top schools but Natalia special personal qualities set her apart. She's both magnetic and sincerely kind.

Thanks and all my best,

Farah Peterson

Farah Peterson - fpeterson@uchicago.edu - 773-702-9494

June 16, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

Natalia McLaren, who is a 2L at the Law School, has applied for a clerkship position in your chambers. I believe she would be a great law clerk, and I recommend her enthusiastically.

I had the opportunity to teach Natalia in a seminar course, U.S. Supreme Court: Theory and Practice, during the Fall Quarter of her 2L year of law school. I quickly was impressed with Natalia's excellent contributions to our class discussions. Her comments and questions were insightful and interesting. They regularly advanced the class discussion in a productive way.

Natalia did two major assignments for this seminar course: a mock Supreme Court brief and a mock Supreme Court oral argument. Students review opinions and filings from real cases, analyze the legal issues in the cases, develop the best arguments for their side, and demonstrate their written and oral advocacy skills. Natalia did impressive work on these projects. She earned a grade of 179 in the course – a strong grade on our Law School's strict grading curve.

Natalia's brief for the seminar was well-written, clear, and persuasive. The students drafted a brief in opposition to a petition for certiorari, which alleged a circuit split on a vicarious liability question. Natalia successfully dismantled the petition in her brief in opposition. She spotted and raised strong arguments for her side. She effectively explained why the circuits in fact are in alignment on the question presented. She also identified other important problems with petitioner's arguments.

Natalia similarly delivered a good oral argument for the seminar. The students argued *Percoco v. United States*, which was then pending before the Supreme Court. At issue in the case was whether a private citizen with influence over government decision-making could be convicted of "honest services" wire fraud. The case required the students to grapple with some tough concepts, and then to figure out how to address difficult hypotheticals. Natalia demonstrated a strong understanding of the facts, issues, and arguments in the case. She made thoughtful legal and policy arguments in support of her position. She did a good job handling tough questions.

I enjoyed having Natalia in class and getting to know her outside of class, too. She seems personable, engaging, and interesting. She strikes me as being equally at ease discussing difficult legal questions and talking about current events or pop culture. I think she would be great to have in chambers.

Natalia is exceptional in other ways, too. Her parents both immigrated to the United States from Jamaica before she was born. Natalia grew up in the Poconos, Pennsylvania. She was a successful athlete and musician growing up. Just in high school, for example, she explains that she made varsity in three sports, was the first chair violin, and made the most competitive singing group at her school. Natalia now is an avid creative writer, as well. She first discovered her love of creative writing in a course her freshman year of college. She explains that she ultimately went on to do her college senior thesis in Creative Writing – and that she earned high honors for her biographical fiction about her mother's early life. She seems to be an outstanding storyteller (in a good way).

I believe that Natalia would be a strong law clerk, and I am happy to have the opportunity to recommend her.

Sincerely,

Sarah M. Konsky
Director, Jenner & Block Supreme Court and Appellate Clinic
Associate Clinical Professor of Law

Sarah Konsky - konsky@uchicago.edu - 773-834-3190

NATALIA McLAREN

5100 South Cornell Avenue, Unit 505, Chicago, Illinois 60615 • (570) 242-0314 • nmclaren@uchicago.edu

Writing Sample

I prepared the attached writing sample for my Legal Research & Writing class at the University of Chicago Law School. In this assignment, I was asked to write a memorandum about the likelihood of the U.S. District Court for the Northern District of Illinois finding that a billboard's message contained commercial speech under the First Amendment of the U.S. Constitution in a fictional case. I did not excerpt this piece for this writing sample. My professor and my school's writing coach provided feedback on the piece.

MEMORANDUM

To: Professor Shaffer
From: Natalia McLaren
Re: Winter Open Memo
Date: February 15, 2022

Question Presented

SpaceY erected billboards on Chicago's Interstate 55 featuring an image of a football player hitting Roy Kent in his final game playing on the Chicago Bears. The billboards include SpaceY's logo, and the text, "Check Your Blind Spot! You Should Care When Driving!" Kent wants to take legal action against SpaceY's billboards, seeking to have SpaceY take the billboards down. Under the First Amendment of the United States Constitution, did SpaceY's billboards constitute commercial speech?

Brief Answer

The court will likely find that SpaceY's billboards do not constitute commercial speech under the First Amendment. The billboard's speech likely does not propose an economic transaction, bolster specific products, act as an advertisement, or derive from an economic motivation, as the only speech potentially with a commercial nature is SpaceY's logo on the billboards. As the court would probably determine that the logo was inextricably intertwined with the billboard's public service reminder to stay alert and safe while driving, SpaceY's billboards will likely receive full protection under the First Amendment as noncommercial speech.

Facts

Roy Kent's career as a professional football player on the Chicago Bears ended when he took a hit to his blind side. Following his retirement, Kent worked for the Bears as an assistant

coach. While he coached, fans from opposing teams frequently taunted Kent about the career-ending play. Reporters often asked Kent about the taunts, and he always responded, “I don’t care,” even though the jeers secretly hurt him.

Kent helped coach the Bears to a victory at Super Bowl LVI. One day after the Bears’ win, Eton Lusk’s Green Bay, Wisconsin–based space company, SpaceY, erected billboards along Chicago’s Interstate 55. The billboards contained an image of a football player sacking Kent in his final game before retirement, SpaceY’s logo, and the text, “Check Your Blind Spot! You Should Care When Driving!” Lusk explained why SpaceY, his company based in the Bears’ rival team’s city, put up the billboards: running his electric car company, a company separate from SpaceY, taught him the importance of auto safety, and he wanted to share that message.

Roy Kent wants to take legal action in the U.S. District Court for the Northern District of Illinois against SpaceY for erecting billboards with his image.

Analysis

The First Amendment of the United States Constitution prohibits the government from restricting the freedom of speech. U.S. CONST. amend. I. While noncommercial speech receives full protection under the First Amendment, commercial speech receives less protection. *See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). Although commercial speech receives lesser protections than fully protected First Amendment speech, commercial speech still retains some protection under the First Amendment. *Bigelow*, 421 U.S. at 826 (holding that while an advertisement about abortion availability for Virginia residents in New York constituted commercial speech, course must still weigh the commercial message at stake against “the public interest allegedly served by the regulation.”).

Courts consider multiple factors to determine whether speech is commercial or noncommercial, including whether the speech contains an advertisement, references specific products, proposes transactions, stems from economic motivations, or whether commercial elements must intertwine with noncommercial elements to create a message to the public. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989); *Riley v. Nat’l Fed. Of the Blind of N.C.*, 487 U.S. 781, 794–95 (1988). Even if some elements of a message contain commercial speech, the inextricably intertwined doctrine considers whether commercial speech must intertwine with noncommercial speech to deliver a message. *See, e.g., Riley*, 487 U.S. at 796. The precedent that shaped commercial speech doctrine derives from public-law cases, and has yet to clarify how the protection afforded to commercial speech applies to clashes between private rights. *See Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 514–15 (7th Cir. 2014). However, this complexity goes beyond the scope of the question presented.

This memo first addresses whether SpaceY’s billboards contain commercial speech that would receive lesser protections under the First Amendment, and then analyzes how the court may view the portions of SpaceY’s speech that might have commercial elements in light of the inextricably intertwined doctrine. Both inquiries help determine the likelihood of whether the court will find that SpaceY’s billboards constitute separable commercial speech that receives lower constitutional protection.

(1) SpaceY’s billboards likely do not constitute commercial speech.

Commercial speech doctrine applies when speech “propose[s] an economic transaction,” but that definition only presents a starting point, especially when speech may not be “characterized merely as proposals to engage in commercial transactions.” *See Fox*, 492 U.S. at

482 (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 761); *Bolger*, 463 U.S. at 66; *see also Jordan*, 743 F.3d at 516–17 (“[I]t’s a mistake to assume that the boundaries of the commercial-speech category are marked exclusively by this ‘core’ definition.”). The *Bolger* framework sets out other considerations, including whether: “(1) the speech is an advertisement; (2) the speech refers to a specific product; and (3) the speaker has an economic motivation for the speech.” *United States v. Benson*, 561 F.3d 718, 725 (7th Cir. 2009) (citing *Bolger*, 463 U.S. at 66–67); *see also Jordan*, 743 F.3d 509, 517. However, no one factor may by itself place speech in the commercial category, but some combination of factors may suggest that the content constitutes commercial speech. *See Bolger*, 463 U.S. at 66–67; *see also Jordan*, 743 F.3d at 518–19. In addition, the *Bolger* framework provides a general inquiry—how narrowly or broadly a court may apply it depends on the facts presented to the court. *See Jordan*, 743 F.3d at 517.

When speech “contains both commercial and noncommercial elements,” and stops short of clearly proposing a commercial transaction, courts use and modify the general *Bolger* framework to determine whether the messaging or imaging promotes brand loyalty or awareness. *See Jordan*, 743 F.3d at 518–19. In *Jordan*, the court first determined that while Jewel’s grocery stores’ page in *Sports Illustrated* did not explicitly propose a transaction for a specific product, the message still constituted an “advertisement” because “it promote[d] brand awareness or loyalty.” *Id.* at 518. The court then broadened the *Bolger* framework prong relating to whether the speech referred to a specific product to include general brand and image advertising and incorporated that inquiry in determining whether the speech was also an advertisement with an economic motivation. *Id.* at 519–20. The court found that since Jewel included both its logo in the center of the magazine page and incorporated Jewel’s slogan into its message congratulating Michael Jordan on his induction into the National Basketball Association’s Hall of Fame,

Jewel's message burnished the specific "brand name" and "enhance[d] consumer goodwill." *Id.* In doing so, the court determined that Jewel's "specific product" was their brand name, and their economic motive was to burnish their brand "to enhance consumer goodwill." *Id.*

The court will likely find that SpaceY's billboards were not "plainly aimed at fostering goodwill" for SpaceY's brand. *See Jordan*, 743 F.3d at 518. The court in *Jordan* heavily focused its inquiry on how Jewel's logo appeared front and center on the magazine page and also that Jewel incorporated its motto into its message congratulating Jordan. *Id.* However, from the information provided, only SpaceY's logo appeared on the billboard, and its text, "Check Your Blind Spot! You Should Care When Driving!" merely incorporated Kent's repeated response to reporters, "I don't care." The message contained nothing about SpaceY's slogan, assuming it has one. Although it is unclear from the fact pattern if SpaceY's logo appears in large, center-facing font, the fact that its slogan does not appear on the billboard distinguishes it from *Jordan*. In addition, while Michael Jordan hailed from Chicago and had a loyal fanbase, and so congratulating Jordan might have bolstered goodwill for Jewel Food Stores, SpaceY makes fun of Kent, a beloved football-player-turned-coach, in Kent's team's city, just a day after the Bears' Super Bowl win. Instead of fostering goodwill for SpaceY's brand, the billboards almost seem to *diminish* SpaceY's brand in Chicago at the cost of making a joke that simultaneously reminds the public to stay safe and keep alert while driving. Although one may argue that "no press is bad press," and that SpaceY promotes its brand just through visibility alone, courts make it clear that no one factor makes speech commercial. *See Bolger*, 463 U.S. at 66–67; *see also Jordan*, 743 F.3d at 518–19.

(2) *SpaceY's billboards likely contain inextricably intertwined commercial and noncommercial speech.*

When speech must contain both commercial and noncommercial elements to convey a message, courts deem the speech inextricably intertwined, noncommercial, and thus protected by the full force of the First Amendment. *See, e.g., Riley*, 487 U.S. at 796; *Fox*, 492 U.S. at 474; *Jordan*, 743 F.3d at 521. Conversely, when “no law of man or of nature” renders it impossible to separate the noncommercial and commercial aspects of speech, courts give the commercial speech a lower degree of protection. *See Fox*, 492 U.S. at 474.

The inextricably intertwined doctrine “applies only when it is legally or practically impossible for the speaker to separate out the commercial and noncommercial elements of his speech,” but cannot be applied by “simply combining commercial and noncommercial elements in a single presentation.” *Jordan*, 743 F.3d at 521. In *Jordan*, the court faced the question of whether Jewel’s advertisement in Times’ *Sports Illustrated* contained inextricably intertwined commercial and noncommercial elements. The court’s finding in *Jordan* suggests that the commercial elements—including Jewel’s center-facing logo and slogan to promote Jewel’s brand name—could have been separated from the message congratulating Jordan’s Hall of Fame initiation. *See Jordan*, 743 F.3d at 521–22 (“The commercial and noncommercial elements of Jewel’s ad were not inextricably intertwined in the relevant sense. No law of man or nature compelled Jewel to combine commercial and noncommercial messages as it did here.”). In addition, the court in *Fox* found that Tupperware companies did not need to solicit kitchenware to students in order to teach students home economics. As “no law of man or of nature makes it impossible to sell housewares without teaching home economics,” or vice versa, the inextricably intertwined doctrine allowed the court to view the commercial messaging from a lower constitutional standard. *Fox*, 492 U.S. at 474. Conversely, the court in *Riley* found that even if North Carolina’s mandated speech constituted commercial speech, since professional fundraisers

could not express otherwise fully-protected speech without including the mandated messaging, the speech was inextricably intertwined. 487 U.S. at 795–96. Thus, the court determined that the speech “as a whole” retained full protection under the First Amendment. *Id.*

Even if the U.S. District Court for the Northern District of Illinois found that SpaceY’s billboards contained some form of commercial speech, the court will likely find the commercial messaging inextricably intertwined with the noncommercial speech regarding public safety. While the court in *Jordan* emphasized the commercial nature of Jewel’s magazine page due to the incorporation of Jewel’s slogan in Jordan’s congratulatory message, as well as Jewel’s large, center facing logo on the page, SpaceY only included its logo on the billboard with a message unrelated to its company. *Jordan*, 743 F.3d. at 519–20. One could imagine that to erect a billboard, the creator must at least include its name to signify who produced the message. If denoting the creator is necessary, then SpaceY would be unable to put up billboards with noncommercial messaging related to public safety without incorporating the possible commercial component of the company’s name. For this reason, SpaceY’s logo would likely be deemed inextricably intertwined with the billboard’s message to stay alert while driving. Thus, it is likely that SpaceY’s billboards would receive full protection under the First Amendment.

Conclusion

The Northern District of Illinois will likely conclude that SpaceY’s billboards do not constitute commercial speech. SpaceY’s billboards include an image of Kent, a public safety message tied with a jibe to the famous football-player-turned-coach, and SpaceY’s logo. Although the billboards contain a form of speech possibly considered commercial—the logo—the lack of other branding and the failure to include a slogan for SpaceY may dilute the logo’s

commercial significance. In addition, even if the court finds that the logo inherently possesses a commercial nature, the ability to erect a billboard with noncommercial messaging probably requires the creator to tie its name to the content. For this reason, the noncommercial elements are likely inseparable from the logo, and the court would deem the billboards inextricably intertwined noncommercial speech. Thus, the court will likely determine that SpaceY's billboards do not constitute commercial speech, and therefore will receive full constitutional protection under the First Amendment.